Office-Supreme Court, U.S.
FILED
JUN 15 1981
ALEXANDER L. STEVAS,
CLERK

80-2124

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMBASSADOR COLLEGE, INC., WORLDWIDE CHURCH OF GOD, INC., and THE WORLD TOMORROW,
Petitioners,

v.

GEORGE DANIEL McELROY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN, DISTRICT III

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Mass. 02138
(617) 495-4621

JAMES P. GERLACH
LaROWE & GERLACH
110 Main Street
Reedsburg, Wisconsin 53959
(608) 524-6444

THOMAS D. BELL
DOAR, DRILL & SKOW
103 North Knowles Avenue
New Richmond, Wisconsin 54017
(715) 246-2211

Counsel for Petitioners

Questions Presented

Under a Constitution that forbids religious persecution, may the ban on heresy trials be circumvented by recasting accusations of false teaching as charges of "undue influence," and replacing penal sanctions with civil deprivations of private property?

More specifically:

1. May a state court divest a church of property donated at arm's length by a competent, adult church member who has since grown disillusioned with the church's doctrines, where there has been no finding of force, fraud, or any other unlawful *method* of inducing the donation,

   (a) on the ground that the *content* of the church's doctrines, as evidenced by the prophesies they proclaim, betrays anyone who is persuaded by such beliefs as "susceptible" to "undue influence"?

   (b) on the ground that the *effect* of the church's doctrines, as evidenced by the donations they inspire, betrays anyone who persuades others of such beliefs as guilty of forbidden "religious indoctrination"?

2. Where there is a substantial risk that a jury's finding of "undue influence" through "religious indoctrination" rested on grounds forbidden by the Religion Clauses of the First Amendment, may the jury's verdict and the judgment entered thereon be upheld without inquiry into that risk, simply because the state's rules of undue influence are deemed *facially* valid?

TABLE OF CONTENTS

PAGE

Questions Presented i

Opinions Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 13

I. The judgment below defies both the premises of the Religion Clauses and the Church's rights thereunder by treating a believer's very acceptance, on faith, of the Church's teachings as proof of "indoctrination" and, on that basis, permitting former Church members to rescind long-completed religious donations without proof of force, fraud, or other abuse 15

II. The judgment entered against the Church embodies a discriminatory intrusion by civil courts into religious matters and jeopardizes the autonomy of churches *vis-à-vis* both the state and disgruntled members or contributors 19

III. The courts below up-ended long-settled constitutional doctrine by refusing to entertain the Church's First Amendment challenge to the state's undue influence rule *as applied to it*, on the ground that the rule, *if facially valid*, could pose no further constitutional problem 25

Conclusion 29

INDEX TO APPENDICES

APPENDIX A— PAGE

Opinion of Wisconsin Court of Appeals 1a

APPENDIX B—

Order of Wisconsin Supreme Court 6a

APPENDIX C—

Memorandum Opinion of Barron County Circuit Court 7a

APPENDIX D—

Order for Judgment of Barron County Circuit Court 8a

APPENDIX E—

Judgment of the Barron County Circuit Court 11a

APPENDIX F—

Letter of February 28, 1973, from George McElroy to Ralph K. Helge, Esq. 14a

TABLE OF AUTHORITIES

Cases: PAGE

Boddie v. *Connecticut*, 401 U.S. 371 (1971) 25
Blocker v. *United States*, 288 F.2d 853 (D.C. Cir. 1961) (*en banc*) 19
Buckley v. *Valeo*, 421 U.S. 1 (1976) (*per curiam*) 30

Chaudoir v. *Witt*, 170 Wis. 556 (1919) 4
Cramer v. *United States*, 325 U.S. 1 (1945) 29

Everson v. *Board of Education*, 330 U.S. 1 (1947) 21

Founding Church of Scientology v. *United States*, 409 F.2d 1146 (D.C. Cir.), *rehearing denied*, 409 F.2d 1163 (*per curiam*), *cert. denied*, 396 U.S. 963 (1969) 14, 22, 29
Fowler v. *Rhode Island*, 345 U.S. 67 (1953) 21

Hallinan v. *Roman Catholic Archbishop of San Francisco*, 247 Cal.App.2d 410 (1966), *cert. denied*, 389 U.S. 820 (1967) 14

International Society for Krishna Consciousness, Inc. v. *Barber*, Slip Opinion (2d Cir. June 3, 1981) 18

Kedroff v. *Saint Nicholas Cathedral*, 344 U.S. 94 (1952) 29
Kreshik v. *Saint Nicholas Cathedral*, 363 U.S. 190 (1960) 29

Little v. *Streater*, 49 U.S.L.W. 4581 (U.S. June 1, 1981) 25

Marsh v. *Alabama*, 326 U.S. 501 (1946) 18
Martin v. *City of Struthers*, 319 U.S. 141 (1943) 18, 20
Matsumoto v. *Soka Gakkai*, 1976 (O) No. 749 (Japan Sup. Ct., No. 3 Petty Bench, April 7, 1981) 30

PAGE

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954) 2
Murdock v. *Pennsylvania*, 319 U.S. 105 (1943) 18, 22

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 20
Presbyterian Church in the United States v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) 23, 30

Serbian Eastern Orthodox Diocese v. *Milivojevich*, 426 U.S. 696 (1976) 18, 22, 23, 24
Sherbert v. *Verner*, 374 U.S. 398 (1963) 14, 20, 27, 30
Street v. *New York*, 394 U.S. 576 (1969) 29
Stromberg v. *California*, 283 U.S. 359 (1931) 29
Sullivan v. *Texas*, 207 U.S. 416 (1908) 2

Terminiello v. *City of Chicago*, 337 U.S. 1 (1949) 27
Terrett v. *Taylor*, 13 U.S. (9 Cranch) 43 (1815) 30
Thomas v. *Review Board*, 101 S.Ct. 1425 (1981) 17, 27
Torcaso v. *Watkins*, 367 U.S. 488 (1961) 21

United States v. *Ballard*, 322 U.S. 78 (1944)....13, 14, 17, 18, 20, 24, 30
United States v. *Carolene Products Co.*, 304 U.S. 144 (1938) 20
United States v. *Kauten*, 133 F.2d 703 (2d Cir. 1943).... 17

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 18, 31

Walz v. *Tax Commission*, 397 U.S. 664 (1970) 21, 22
Watson v. *Jones*, 80 U.S. (13 Wall.) 679 (1871) 21, 22
Williams v. *North Carolina*, 317 U.S. 287 (1942) 29
West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943) 21, 24

PAGE

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 3, 27

Yates v. *United States*, 354 U.S. 298 (1957) 29

Zorach v. *Clauson*, 343 U.S. 306 (1952) 16

Constitutional and Statutory Authority:

United States Constitution—
Amendment I ..... *passim*
Amendment XIV ..... *passim*

United States Code—
28 U.S.C. § 1257(3) 2

Wisconsin Statutes—
§ 808.10 2
§ 809.10(4) 25-26
§ 809.62 2

Miscellaneous:

American Law of Property (A. J. Casner ed. 1952) 4

1 *Corinthians* 13:8, 13:9 (King James) 24

Howe, M., *The Garden and the Wilderness* (1965) 22

Kauper, P., *Religion and the Constitution* (1964) 18

Madison, J., *Memorial and Remonstrance Against Religious Assessments* (1784), *reprinted in* J. Madison, *Writings* (G. Hunt ed. 1901) 20

Otto, P., *The Idea of the Holy* (1929) 18

Note, "Toward a Constitutional Definition of Religion," 91 Harv. L. Rev. 1056 (1978) 18

Tillich, P., *The Dynamics of Faith* (1957) 18

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMBASSADOR COLLEGE, INC., WORLDWIDE CHURCH OF GOD, INC., and THE WORLD TOMORROW,

Petitioners,

v.

GEORGE DANIEL McELROY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WISCONSIN, DISTRICT III

Petitioners Ambassador College, Worldwide Church of God, and The World Tomorrow respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Wisconsin, District III, entered on December 16, 1980, affirming the judgment of the Barron County Circuit Court, entered on December 31, 1979, declaring null and void a deed dated December 15, 1969, from respondent McElroy to petitioners, and revesting in McElroy full title to the property set forth therein.

Opinions Below

The opinion of the Court of Appeals announcing the judgment at issue appears in the appendix hereto ("App.") at 1a and is unreported. No opinion was rendered by the Supreme Court of Wisconsin, which denied a petition for review on March 16, 1981. App. 6a. The trial court's memorandum opinion, order for judgment, and judgment are set forth at App. 7a, 8a, and 11a, respectively.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed by this petition was entered on December 16, 1980, and appears at App. 1a. On March 16, 1981, the Wisconsin Supreme Court denied petitioners' timely petition for review under Wisconsin Statutes §§ 808.10, 809.62. App. 6a. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). *See Sullivan* v. *Texas*, 207 U.S. 416, 422 (1908); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 160 (1954).

Constitutional Provisions Involved

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

United States Constitution, Amendment XIV, § 1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioners[1] ("the Church") seek review of a judgment of the Court of Appeals of Wisconsin, District III, affirm-

[1] The Worldwide Church of God, Inc., incorporated in California in 1947, is one of the temporal entities through which the Church of God, an unincorporated spiritual body, conducts its principal activities in the United States. Membership of baptized adults is

ing a trial court's rescission of a deed executed by respondent McElroy approximately eleven years earlier as a religious offering to the Church—then, McElroy's church. The property irrevocably deeded to the Church in 1969 was a remainderman interest in an 85-acre farm in Wisconsin that McElroy had himself owned and operated since his divorce in 1960. McElroy reserved a life estate in the farm thus deeded to the Church.[2]

At the outset, it should be stressed that several issues are *not* presented by this case. One of the grounds that McElroy—a businessman of considerable experience,[3] if limited formal education[4]—advanced as a basis for rescission when he filed this suit in June 1978 was that he had been misled into thinking that the deed could be revoked at will.[5] But he had mentioned no such belief or basis for

---

estimated at 67,000 worldwide; church attendance is estimated to average 97,000.

Ambassador College, Inc., founded by the Church of God in 1947, was incorporated by the latter in California in 1951 to train students for the ministry of the Church of God.

The World Tomorrow is not a corporation but a trademark for radio and television broadcasts of the Church of God.

[2] It was Ambassador College that respondent McElroy named in his deed as recipient of the remainderman interest in the farm.

[3] It is undisputed that McElroy ran his own business buying and selling farm commodities and transporting them to market for a considerable period in the 1930s, *see* Trial Transcript ("T.") at 71-72; that he purchased a farm in 1944, conducting the entire transaction, including making loan arrangements, on his own, *id.* at 74; that he was divorced in 1960, representing himself in the proceedings and negotiating on his own a settlement which left him with title to the farm at issue in this litigation, *id.* at 78; that he has run the farm himself since that time, doing his own bookkeeping, *id.* at 79; and that, as a section coordinator in the National Farmers Organization, he devised a successful plan to increase the income of the member cattlemen in his region. *Id.* at 83, 87.

[4] Born in 1913, McElroy left school in the eighth grade to work on his father's farm. T. 4, 67. *Cf. Wisconsin* v. *Yoder*, 406 U.S. 205, 222-29 (1972).

[5] *See* Complaint ¶ 6.

voiding the deed either when he first indicated a desire that it be revoked,[6] or when he formally requested that the Church revoke it in a letter mailed to the Church in February 1973,[7] several years before filing the instant suit. In any event, the trial court expressly "dismissed that part of [the] case which [was] based on fraud or misrepresentation,"[8] finding insufficient evidence of any such wrongdoing. And, of course, even if shown, any erroneous belief held by McElroy but not induced by the donee would not have supported rescission. *See Chaudoir* v. *Witt*, 170 Wis. 556, 557 (1919); 3 AMERICAN LAW OF PROPERTY § 12.66, at p. 316 (A. J. Casner ed. 1952).

Nor was McElroy's suit for rescission based upon any allegation or evidence of force, coercion, or other unlawful conduct by the Church, or upon any claim or proof that McElroy had become dependent upon the Church for shelter or sustenance, as might occur in a religious commune or compound—where forces other than the spiritual appeal of the religion's precepts could subject a member to a church's "influence." Here, in contrast, it is undisputed that McElroy has, at all times relevant to this lawsuit, been an independent entrepreneur, one who dealt with the Church at arm's length and was completely free to leave it without penalty at any time—as he in fact did in 1972.[9]

Testifying nonetheless that he was somehow "blinded with programming [by] all [of] this . . . literature,"[10] McElroy could point only to the scriptural and other written materials mailed to him (and to thousands of

---

[6] *See* T. 153-57, 170-71.

[7] *See* Trial Court Exhibit 21, App. 14a, 15a-16a (asserting as sole basis of demand for revocation that "God's Word" makes family, not Church, rightful heir).

[8] T. 258. *See also id.* at 233.

[9] T. 57, 153-54, 156-57.

[10] T. 157, quoted at App. 3a. *See also* T. 145.

others) by the Church; to its mass-audience radio programs; to the public sermons of Church leaders; and to correspondence solicited by McElroy himself, as sources of any supposedly improper persuasion or propaganda.[11] And the jury was instructed that it could find "undue influence" without any determination of "fear" or "duress," so long as it found an "unfair" "degree of persuasion." [11a]

The Church had from the outset objected that the gist of McElroy's complaint was simply that he had changed his mind about the truth of various church doctrines, including some doctrines which he identified as having motivated him to leave his farm to the custodians of his faith —not a constitutionally allowable basis, the Church argued from the beginning, for a ruling against the Church in such a suit.[12] But even after the progress of pretrial discovery had led the Church to conclude that McElroy's "proof" would at best show only "a difference in scriptural interpretation and . . . opinion," [13] and had led the Church to seek summary judgment on the ground that such differences were beyond the power of a civil court to resolve,[14] the trial court refused relief.[15] Shortly thereafter, that court also denied the Church's pretrial motion to limit the use of testimonial or other evidence bearing on matters of religious doctrine as such.[16]

Accordingly, just as the opening argument of counsel for respondent McElroy had invited the jury to antici-

---

[11] *See* Transcript of Opening Statements and Summations ("T.O.S.") at 30 (closing argument of counsel for McElroy).

[11a] Transcript of Jury Instructions in Case No. 78 CR 0287.

[12] Answer ¶¶ 11, 14. *See* n. 73 *infra*.

[13] Points and Authority (*sic*) in Support of Motion for Summary Judgment, April 13, 1979, at 2 (Part II-B ¶ 1).

[14] *Id.* at 4 (Part V ¶ 6).

[15] Order of July 5, 1979.

[16] *See* Transcript of Pre-Trial Hearing, August 16, 1979, at 2-3.

pate,[17] the two-day trial was replete with ecclesiastical evidence—first, evidence describing the contents of the

---

[17] *See* T.O.S. at 13-15, 18:

MR. RYBERG (counsel for McElroy):

[T]he testimony in the case will be clear that all of the solicitation efforts done by the defendants were against the understanding, or in the context that you would have to give and give substantially. And that, if you didn't give, you would be cursed. And they used this continually on Mr. McElroy. And Mr. McElroy was not able to resist that. . . .

Now there's no question that the testimony will reveal, from Mr. McElroy and other witnesses that we have, that representatives of this Worldwide Church of God went around and said that the world was gonna come to an end in January of 1972. And there was testimony, there will be testimony to that. If you're going to insure yourself this place of safety, you had better give and give substantially. Now, these were the kinds of things that were told to Mr. McElroy. And he was told that, by a member, he would be taken to the place of safety, which was Petra, over in Jordon, and this would happen in January of 1972.

And that there would be a great tribulation for about three and a half years after that, where everything would be overthrown and the world would be overtaken, and then Christ would come back. But primarily what the defendants did was told their people that the world was coming to an end in January of 1972. That they ought to contribute, they ought to give substantially if they were to be assured the place of safety. Mr. McElroy heard that, bought that, and gave that property based on that. . . .

Now, how did Mr. McElroy get disenchanted then? Well, the evidence in the case will establish that he continued to be a member of the Church into 1972. January of 1972 came along and went and everybody was still here. Then he went along in the summer and he realized that the doctrine they had been using on the firstlings was not a proper one. They told him that the firstlings would have to go to the Church. But in fact the bible said that only ten percent of that animal would have to go to the Church.

And that threw up the red flag to Mr. McElroy. That brought it up to him and made him aware at that time that maybe everything wasn't right. The world didn't end and they weren't entitled to the whole animal. . . .

They told him that the world was coming to an end. And they abused him and they violated the trust that he had placed in them. And I submit, at the conclusion of the case, Ladies and Gentlemen, you're going to find that Mr. McElroy ought to have the property back now.

Church's religious teachings about the impending armageddon in which only the faithful could escape condemnation,[18] and about the importance of accepting the Church hierarchy's scriptural views on matters of faith[19]; and, second, evidence describing McElroy's personal belief that the Church's teachings—although no-one had ever told him so[20]—meant that he could assure his salvation only by executing the deed in question.[21]

The evidence showed that, having been baptized into the Church in June 1967 after five to seven years of hearing its broadcasts and studying its literature, McElroy exchanged letters with Church leaders in a search—initiated by him after hearing a public sermon he found unusually moving—for the best way to leave the Church his estate.[22] The Church had no face-to-face contact with McElroy as he made this decision, on which it had encouraged him to consult with his own legal counsel outside the Church.[23] McElroy considered the options in the privacy of his home,[24] and later consulted with neighbors who advised him against deeding a remainderman interest in his farm to the Church,[25] but he nonetheless did so by quitclaim deed dated December 1969. As he concisely put the matter in the deposition he gave in November 1978: "Nobody had influence over me, I did what I wanted to do."[26]

---

[18] T. 22-23, 25-26, 104-06, 109-10, 159-61, 194-95, 209, 218-19, 222.

[19] *Id.* at 211-12.

[20] *Id.* at 109-10, 112.

[21] *Id.* at 22-32, 109-10.

[22] *Id.* at 33, 113.

[23] *Id.* at 120-22. *See also* Deposition of George McElroy (November 20, 1978) at 28 (lines 14-15); *id.* at 30 (lines 20-25); *id.* at 31 (lines 1-7).

[24] T. 130.

[25] *Id.* at 141-42.

[26] Deposition, *supra* n. 23, at 50 (lines 3-4). At the time he executed this deed, McElroy was 55 years of age; he had three

As early as 1970, McElroy had learned that the "end of the world" he had understood the Church to have predicted for 1972 was not be taken as literally as he had supposed.[37] But he remained loyal to the Church and continued tithing until late in 1972, when he fell into a more decisive doctrinal dispute with Church ministers: because they did not share his interpretation of certain biblical injunctions to give of one's flock to show one's faith—the so-called doctrine of "firstlings"[38]—McElroy decided to leave the Church.

Prior to filing the present lawsuit in June 1978, McElroy had never suggested that some misunderstanding as to the irrevocable nature of the deed he executed in 1969 had anything to do with his desire to take back the property interest he had deeded to the Church.[39] That suggestion, like the suggestion that McElroy had become disillusioned over the Church's world-ending prophesy, has been made by McElroy solely in conjunction with the instant litigation, which he commenced not only to rescind the deed but also to recover all other contributions he had made to the Church from 1964 through 1972 (the latter claim being withdrawn after trial).

Inasmuch as the trial court, at the close of the evidence, had dismissed as groundless McElroy's allegations of

---

grown children; he had been divorced for nearly a decade; he was in good physical and mental health, T. 66-67; and he had been contributing regularly to the Church for over five years since his baptism in 1967—having begun the practice of contributing, or "tithing," in the early 1960s on his own initiative. *Id.* at 9, 92. In McElroy's tax returns for 1967 and for several years thereafter, he took full advantage, upon professional advice, of the irrevocable character of the gift he had made to the Church through the deed he executed in December 1969. *Id.* at 130-31, 144-45.

[37] *Id.* at 108, 159-60. *See also* n. 65 *infra*.

[38] *Id.* at 52, 57, 153-57, 171, 197.

[39] *See* n. 7 *supra*; T. 61, 154, 205.

fraud and misrepresentation,[30] his counsel in closing argument could hardly urge the jury to find in his favor on the remaining issue—that of "undue influence"— solely on the basis of McElroy's supposed belief (at most a unilateral mistake) that the deed he was executing in 1969 could be undone at any time. McElroy's counsel thus called the jury's attention to those features of the case that the Church had earlier sought unsuccessfully to exclude in its motion for summary judgment of April 27, 1979,[31] and then in its motion of August 16, 1979, asking that evidence of religious doctrine be limited by the trial court.[32] Specifically, McElroy's counsel focused in his summation on the evidence that had been submitted to the jury about the Church's doctrine of the millenium, which counsel contrasted with doctrines of those churches to which he supposed that the jurors themselves belonged.[33] Repeatedly underscoring the fact that McElroy had actually "bought [the Church's doctrine] lock, stock" and barrel, counsel in fact relied on McElroy's very adherence to the tenets of the Church as "proof" of McElroy's susceptibility to unfair ad-

---

[30] T. 225, 233, 258.

[31] The motion was denied from the bench on the same day, and in a minute order of July 5, 1979. *See* n. 15 *supra* & n. 73 *infra*.

[32] *See* n. 73 *infra*.

[33] *See* T.O.S. at 59:

> MR. RYBERG (counsel for McElroy):
>
> . . .
>
> Now, in the second area that they talk about, that really this church is no different from any other church, or the church that you might be a member of. Ladies and Gentlemen, I submit to you that that's an insult to your intelligence. You know from your churches that they don't talk like that. You know that they weren't talking about the end of the world in January of 1972. You know that they weren't trying to get money to go to a place of safety, or anything like that, and weren't talking about the great tribulation for three and a half years after that, and the whole thing was going to go kaput in 1975.

vantage—inasmuch as the Church's doctrine as to the world's end was, counsel told the jury, *simply untrue*.[34] The jury's mission in such a case, McElroy's counsel boldly concluded, was to

---

[34] *Id.* at 30, 32-34, 36-37:

> [W]hen you take a look at those income tax returns, Ladies and Gentlemen, you will see that Mr. McElroy wasn't making very much money and that, in fact, he contributed substantial amounts of money when he had nothing.
>
> Now, the question becomes: Why did he do that? He did that, Ladies and Gentlemen, because they told him to do that. And they programed (*sic*) him through the literature, through the radio programs, through the sermons that he heard, to do what they told him.
>
> What did Mrs. Stevenson [one of McElroy's witnesses] say about obedience? She said that, if you question any of the ministers, if you criticize any of the ministers, then, by golly, you're questioning and you're criticizing Jesus Christ. . . .
>
> And that's why he followed, like a sheep, to be shorn by these people, for all these years. . . .
>
> Now, as a backdrop to all of that, Ladies and Gentlemen, there is this constant preaching about the end of the world. And you heard that from all of the witnesses today. And you heard too . . . that they'd withdrawn that one publication that talked about the end of the world. They're kind of uncomfortable about that, I suppose, because the world didn't end. . . .
>
> But the backdrop, the context in which Mr. McElroy did this is very important. He told you at the end of his testimony today that he gave the deed, he gave the will, and he did these things because he was afraid of the holocaust. Well, they told him that he was going to be taken to a place of safety if you were an appropriate member in January of 1972. And you know he bought that, lock, stock, the whole thing. He bought the whole program, Ladies and Gentlemen. And they told him, too, that three and a half years after that there was gonna be the great tribulation. There wasn't gonna be anything left at that point. And Mr. McElroy relied upon that. He said, "My land, I would like to be in that place of safety and I want to do my all for the Lord."
>
> And they stressed Mark Ten, Deuteronomy, Leviticus. They told him that if he didn't contribute, if he wasn't a member, if he wasn't an active participant, that he was gonna be cursed. What did that indicate to him? They never told him flat out that if you don't give, you aren't gonna go. They're more

> straighten out that Worldwide Church of God that keeps [saying] the world's coming to an end . . . and then not coming to an end,[35]

the better to do "justice as the conscience of the community" by silencing such claims.[36]

Candidly noting his concern that he might be "balling up bad" by doing so,[37] the trial judge chose, over the Church's renewed objection that matters of "biblical interpretation" lay impermissibly at the controversy's core,[38] to "submit the undue influence issue" to the jury,[39] which promptly found against the Church.[40]

The Court of Appeals, urged by the Church to reverse on the ground that the Church's First and Fourteenth

---

> subtle than that. They just told him that if you don't do your job, you're going to be cursed. . . .
>
> [And] take a look at that piece of information that Mrs. Nelson [another witness for McElroy] presented today. . . . It says that, "We're just about at the time when the world will be coming to an end. Christ is about to come, and we're just about there."
>
> Now, that was the type of literature that they had sent to Mr. McElroy. That was the type of literature that made him believe that the world was going to come to an end in 1969 (*sic*). And that was what prompted him to make the will, do the deed and everything like that. . . .
>
> The backdrop of all of this, of course, would be the end of the world in January of 1972, followed by the great tribulation and ultimately the end of the world in 1975. . . . And we know from the record, we know . . . that that publication [*1975 in Prophecy*] had been out from since about 1956.
>
> So it's clear. Very clear. Crystal clear from the evidence that Mr. McElroy was susceptible to an influence. . . .

[35] *Id.* at 45.

[36] *Id.* at 62-63.

[37] T. 236.

[38] *Id.* at 228, 235-36.

[39] *Id.* at 236.

[40] *Id.* at 259-60. Judgment against the Church was entered by the trial court in accord with this verdict. App. 11a.

Amendment rights had been infringed,[41] heeded instead McElroy's advice that the judgment in his favor be affirmed for the reason, among others, that his "religious fervor" [42] and his unswerving devotion to the Church[43] *themselves* revealed a will overborne.[44] Thus the Court of Appeals expressly treated McElroy's "belie[f] that he would be cursed if he disobeyed God, and that he had to give all to enter the Kingdom of God," [45] as well as McElroy's close "follow[ing] [of] the church's instructions," [46] as signs that McElroy "was susceptible to undue influence" [47] and that, as he had testified without explanation, he had indeed been " 'blinded with programming' " by the Church's mailed messages.[48]

As to the Church's arguments in the court below that the "undue influence" doctrine, *as applied against it on this record*, abridged its rights under the Religion Clauses of the First Amendment and hence under the Due Process Clause of the Fourteenth, the Court of Appeals said nothing responsive. Despite the risk that the Church had in fact been penalized by the jury for spreading what the jurors thought to be a false gospel—as McElroy's counsel had indeed urged the jury to do in his closing peroration[49] —the court below was content simply to observe, in reply to an argument broader than any the Church had ever made, that churches enjoy "no exemption . . . to acquire property through undue influence," even where their "meth-

---

[41] *See* Appellants' Brief in Court of Appeals at 23-43.

[42] *See* Respondent's Brief in Court of Appeals at 23.

[43] *Id.* at 14-15, 17-18. *But see* n. 58 *infra*.

[44] *See* App. 2a-3a, 5a.

[45] *Id.* at 2a.

[46] *Id.*

[47] *Id.* at 3a.

[48] *Id.*, quoting T. 157.

[49] *See* pp. 9-11 *supra*.

ods of compulsion, persuasion, or domination of the donor's mind consist[] [solely] of religious indoctrination." [50]

The Wisconsin Supreme Court having denied without opinion the Church's petition for review,[51] the Church now urges this Court to grant review herein and to reverse the judgment of the Court of Appeals.

Reasons for Granting the Writ

Petitioners claim no exemption from the rules of undue influence for churches as such, and no exemption for undue influence wielded through religious "indoctrination" in the sense of a demonstrably coercive technique for bypassing the would-be-believer's mind and superimposing the Church's will thereon. But respect for the nature of religious persuasion—both from the viewpoint of those who spread the gospel and from the perspective of those who are transformed by it—requires drawing a sharp distinction between (a) proving religious overreaching solely through extrinsic and neutral tests that cannot readily be bent to the religious prejudices of judges and juries, and (b) proving overreaching through tests that in effect "put [people] to the proof of their religious doctrines or beliefs." *United States* v. *Ballard*, 322 U.S. 78, 86 (1944). In *Ballard*, for example, the prosecutor sought to show bad faith by noting that the defendants had composed form-letter testimonials from non-existent persons claiming to have been healed, and had failed even to call their system a "religion" until they were placed on trial.[52] Dispute within the *Ballard* Court centered on whether permitting the use of even such evidence impermissibly risks an adverse verdict "because a jury in a hostile environ-

[50] App. 5a.

[51] *Id.* at 6a.

[52] *See* Transcript of Record in *United States* v. *Ballard*, *supra*, Vol. 4, at pp. 1519-20, 1542.

ment [finds one's] religious teachings false." [13] But no Member of the *Ballard* Court suggested that any *less* restrictive evidentiary limitation would be constitutionally permissible.

So too here, where the issue is couched in terms of "undue influence" rather than fraud (although, prior to the trial court's dismissal of the fraud count, charges of both sorts were present), there should be no doubt, unless *Ballard* is to be deemed inapplicable simply because the penalty suffered by the Church was civil rather than criminal, *but see Sherbert* v. *Verner*, 374 U.S. 398, 403-04 (1963),[14] that any alleged impropriety must be established without reference to the *content* of the faith itself, and solely on the basis of neutral objections to the *methods* allegedly employed to force the faith, or to compel action in accord therewith, upon a church's captives.

But nothing of the sort was established, or even concretely asserted, here. Instead, both the trial court and the Court of Appeals proceeded from the premise that im-

---

[13] 322 U.S. at 87 (majority opinion of Douglas, J.). The majority evidently regarded such a limitation as adequate. *Id.* at 84. Chief Justice Stone, joined by Justices Roberts and Frankfurter, seemingly less sympathetic to the defendants in that case, thought it unnecessary, in the end, to decide the issue. *Id.* at 89-91 (dissenting opinion). And Justice Jackson, who alone faced the matter squarely and unambiguously, would have required complete dismissal of the indictment—even as to the charge of fraudulent misrepresentation of the defendants' actual beliefs, so as to "have done with this business of judicially examining other people's faiths." *Id.* at 95 (dissenting opinion).

[14] *Sherbert* held the absence of criminal (or even civilly penal) sanctions immaterial to a Free Exercise challenge to a state rule operating so as to burden religion. *Id. See also id.* at 407, invoking *Ballard; Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1156 n. 32 (D.C. Cir.) (same), *rehearing denied*, 409 F.2d 1163 (*per curiam*), *cert. denied*, 396 U.S. 963 (1969). For a lower court decision applying *Ballard* to bar a civil action challenging as unduly influenced by Catholic teachings a will devising property to the Catholic Church, *see Hallinan* v. *Roman Catholic Archbishop of San Francisco*, 247 Cal.App.2d 410, 414 (1966), *cert. denied*, 389 U.S. 820 (1967).

proper influence could acceptably be shown through proof that the religious doctrine on the basis of which a church member decided to make a donation taught that such donation was required for salvation, or forecast awful events that did not come to pass; or that the very zeal with which the doctrine was embraced and acted upon implicitly demonstrated the involuntary character of whatever faith and contribution the doctrine inspired. Having argued without success throughout the proceedings below that the First and Fourteenth Amendments admit of no adjudication, civil or criminal, predicated even in part on any such showings, the Church now turns to this Court for vindication of that bedrock proposition of constitutional principle.

I.

The Judgment Below Defies Both the Premises of the Religion Clauses and the Church's Rights Thereunder by Treating a Believer's Very Acceptance, on Faith, of the Church's Teachings as Proof of "Indoctrination" and, on That Basis, Permitting Former Church Members to Rescind Long-Completed Religious Donations Without Proof of Force, Fraud, or Other Abuse.

In the Court of Appeals, McElroy argued that his "conduct after being baptized [itself] evidence[d] a susceptibility to undue influence," inasmuch as only "religious fervor," he maintained, could have led him to "tithe[] in all respects in accordance with the request of the ministers, [give] freely of the firstlings, attend[] all of the Feasts of the Tabernacles, and regularly attend[] the church services in St. Paul." [15] The absence of any extrinsic proof of force, fraud, or other abuse, in his view, made no difference. Evidently agreeing, the Court of Appeals offered this startling observation in support of the jury's verdict of undue influence in this case:

---

[15] *See* Respondent's Brief in Court of Appeals at 14-15, 23.

> McElroy testified that *based upon what the church had told him,* he had reduced his milking herd from thirty to twelve cows. He *believed* that he would be cursed if he disobeyed God, and that he had to give all to enter the Kingdom of God. He *believed* that the world would end in 1972, and *followed the church's instructions* so that he could be led to a place of safety during the holocaust.[56]

That McElroy indeed believed—and acted in accord with his belief—became, both in his argument below and in the Court of Appeals' decision, *proof in itself* that his mind had been "dominat[ed]"[57] by the Church.[58] Surely that turns inside-out this Court's admonition that it is precisely through "the zeal of its adherents and the appeal of its dogma" that each religion *ought* ideally to "flourish." *Zorach* v. *Clauson,* 343 U.S. 306, 313 (1952). It is the essence of the Religion Clauses, after all, that

> [m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or

---

[56] App. 2a (emphases added).

[57] *Id.* at 5a.

[58] The Court of Appeals also listed several other supposed indicia of McElroy's "[s]usceptibility," *id.* at 2a: his "seventh grade education," *id.*; his "recent[] . . . divorce," *id.* (although he had been divorced for *nearly nine years*); his search "for meaning in life when he joined the church," *id.*; his signing a will "modeled after a sample sent to him by the church," *id.*; his decision "to avoid probate . . . [by] donat[ing] his farm by [a] deed that was prepared by the church," *id.* at 3a; his testimony of uncertainty as to the effect of that decision, *id.*; and his wholly conclusory testimony "that he was 'blinded with programming' by the literature sent by the church." *Id.* But any claims of McElroy's blind adherence must at least confront the undisputed fact that McElroy did not succumb to Church leaders' recommendation that he sell his farm and move to the city. T. 132, 166-67. And, at all events, the pivotal role that both the intensity and content of McElroy's beliefs played in the Court of Appeals' decision, as indicated in text above, is unmistakable. *See also* Part III *infra.*

> beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

United States v. *Ballard, supra,* 322 U.S. at 86-87. It is largely for this reason that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas* v. *Review Board,* 101 S.Ct. 1425, 1430 (1981). The incredulity of the court below at the seemingly innocent and selfless way in which McElroy openly embraced the teachings of the Church as guidance for his life—he "stood to gain very little from the donation . . . to the Church," [11] that court archly observed—disregards these basic principles. Indeed, such incredulity is radically incompatible with the truth that religious conviction is distinguished from its moral and philosophical counterparts precisely by virtue of religion's capacity to induce believers categorically to "disregard elementary self-interest . . . in preference to transgressing its tenets." *United States* v. *Kauten,* 133 F.2d 703, 708 (2d Cir. 1943) (A. Hand, J.). "Religious belief," as Judge Hand recognized in *Kauten,* "arises from a sense of the *inadequacy of reason* as a means of relating the individual to his fellow-men and to his universe." *Id.* (emphasis added). As Justice Jackson expressed the matter in his *Ballard* dissent,

> [b]elief in what one may demonstrate to the senses is not faith. All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of

[11] App. 4a.

credulity than is invoked by representations of secular fact in commerce.[60]

What the judgment below treats as proof of undue influence is thus the very *essence* of religious faith: "[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 714 (1976).[61]

Nor is this "essence" limited to a right to contemplate in solitude whatever one chooses to regard as true, or to worship as one wishes in the company of one's fellow believers. It includes as well a right to "win adherents to [one's] faith," *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 (1943), and a reciprocal right to receive such evangelical appeals. *See Marsh* v. *Alabama*, 326 U.S. 501, 508 (1946); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943).

That the mere success of a church in winning such adherents—or the fidelity of the church's converts to the commands of their new-found faith—might serve as any court's definition of religious misconduct would unthinkably penalize proselytizing "activity [that] occupies the same high estate under the First Amendment as [does] worship in the churches." *Murdock* v. *Pennsylvania*, *supra*, 319 U.S. at 109. And the discredit any such rule would bring in its wake would also cast an unwarranted pall of doubt over

---

[60] 322 U.S. at 94. Indeed, even in commerce, the First Amendment severely limits a State's power as *parens patriae* to "protect" its adult citizens from non-fraudulent verbal "influences" that the State deems "undue." *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

[61] *Accord, International Society for Krishna Consciousness, Inc.* v. *Barber*, Slip Opinion at 17 (2d Cir., June 3, 1981); P. Kauper, *Religion and the Constitution* 26 (1964); P. Otto, *The Idea of the Holy* (1929); P. Tillich, *The Dynamics of Faith* (1957); Note, "Toward a Constitutional Definition of Religion," 91 Harv. L. Rev. 1056, 1061, 1075 & n.108 (1978).

the state's power to cope with genuine instances of coercion used to ensnare followers. These unacceptable results would follow even if a truly neutral principle, automatically equating intensity of religious zeal with degree of civic impropriety, were at work in decisions such as that below.

But no neutral principle *is* at work here. For it is only with respect to *religious claims alien to the factfinder's own practices and premises*—claims that it would "insult [the fact-finder's] intelligence" to equate with those of his or her own church[62]—that the court below could possibly have thought to link the very fact of faith with a condemnatory inference of "domination of the donor's mind."[63] Herein lies a second reason for this Court to review and reverse the judgment below.

II.

The Judgment Entered Against the Church Embodies a Discriminatory Intrusion by Civil Courts Into Religious Matters and Jeopardizes the Autonomy of Churches Vis-a-Vis Both the State and Disgruntled Members or Contributors.

It was not devotion to *any* faith that the court below meant to regard as a sign of impermissible influence; what made that court suspicious was a donor's allegiance to tenets of belief and practice that members of larger and more established religions are most likely to reject as implausible or improper—as an "insult to [the] intelligence" of the majority. In effect, the court below stood ready to pick and choose between "sound" and "unsound"

---

[62] *See* T. 59; n. 33 *supra*.

[63] App. 5a. That choices of belief and conduct must be *presumed* voluntary absent unmistakable proof to the contrary is, of course, a basic axiom of our legal order. *See Blocker* v. *United States*, 288 F.2d 853, 865 (D.C. Cir. 1961) (*en banc*) (Burger, J., concurring in result).

faiths, an approach inescapably corrupted by bias toward the conventional and familiar—and against minorities.[44]

In addition to this invidious discrimination against minority faiths, the approach employed below is intrinsically objectionable. In his brilliant *Memorial and Remonstrance Against Religious Assessments* (1784), James Madison decried any suggestion that "the Civil Magistrate is a competent Judge of Religious truth" as an "arrogant pretension falsified by the contradictory opinion of Rulers in all ages, and throughout the world." II J. Madison, *Writings* 183-91 (G. Hunt ed. 1901). It was in this great tradition that this Court took its stand when it ruled that no judge or jury could be empowered to determine whether the religious claims made by defendants in a case prosecuted by supposedly defrauded ex-believers were in fact meritorious:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. . . . It embraces the right to maintain theories of life and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. . . . The religious views espoused by [non-mainstream religious bodies] might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

United States v. *Ballard, supra,* 322 U.S. at 86-87.

---

[44] Such discrimination against religious minorities need be neither explicit nor intentional to be constitutionally suspect. *See, e.g., Sherbert* v. *Verner, supra,* 374 U.S. at 406; *Martin* v. *City of Struthers, supra,* 319 U.S. at 146; *United States* v. *Carolene Products Co.,* 304 U.S. 144, 153 n. 4 (1938) (describing *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925)).

Perhaps the most powerful—and surely the best known—expression of this principle is to be found in Justice Jackson's opinion for the Court in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

See also Watson v. *Jones*, 80 U.S. (13 Wall.) 679, 728 (1871). Whenever a court or jury (whose members may be assumed to accept the truth of their own religious beliefs as self-evident) dismisses a litigant's faith as folly, "[t]he power and authority of the State . . . [are] put on the side of one particular sort of believers," a grim reenactment of "the philosophy of intolerance" against which this Nation's Constitution and Bill of Rights were cast. *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961). The "[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers," *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947), and forbids all state practices that amount to "religious gerrymanders." *Walz* v. *Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). "To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister" a legally suspect form of influence "is merely an indirect way of preferring one religion over another." *Fowler* v. *Rhode Island*, 345 U.S. 67, 70 (1953).

Such intrusion of civil authority into the theological realm is forbidden for at least three separate reasons, over and above its inherently discriminatory cast. First, such intrusion threatens to corrupt the state itself by dragging

it into religious disputes. *See* M. Howe, *The Garden and the Wilderness* 2 (1965). Second, intrusion of this sort "displace[s] the free religious choices of [individual] citizens by placing [government's] weight behind a particular religious belief, tenet, or sect." *Serbian Eastern Orthodox Diocese, supra,* 426 U.S. at 733 (Rehnquist, J., joined by Stevens, J., dissenting). And, third, this form of intrusion threatens "the total subversion of . . . religious bodies," by inviting "any one aggrieved by . . . their decisions [to] appeal to the secular courts [to] have them reversed." *Watson* v. *Jones, supra,* 80 U.S. (13 Wall.) at 729.

By awarding rescission of a religious donation to a disaffected former church member or contributor who could offer no extrinsic evidence of improper inducement or force, the decision below thus not only fostered "excessive governmental entanglement with religion," *Walz* v. *Tax Commission, supra,* 397 U.S. at 674, but also declared open season on churches and their followers by clearing a path along which disgruntled former believers might drag churches and courts alike into a theological thicket by the simple expedient of suing for a refund of their donations and styling their grievance "undue influence." If "a disgruntled former adherent could . . . sue a church . . . because it had collected money from him on the basis of allegedly 'false' doctrines concerning salvation, heaven and hell," *Founding Church of Scientology* v. *United States, supra,* 409 F.2d at 1156 n.32, then any religion engaging in the constitutionally protected activity of raising "funds to remain a going concern," *Murdock* v. *Pennsylvania, supra,* 319 U.S. at 111; *id.* at 112, 115-16, may suddenly discover all of its publicly proclaimed doctrines transformed into easy targets for litigious refund-seeking donors.

Apart from chilling advocacy and solicitation by religious bodies, permitting such suits would mean that all

ecclesiastical matters, even those kept wholly within the fold, would become potential subjects of actual or threatened civil actions seeking refund or rescission, and perhaps subjects of other forms of pressure as well. For the judgment below invites members of a religious body—to whom the religious body's authoritative structures for decision may entrust no role with respect to a given matter—to bring their views on that matter directly to bear on the religious body's leadership simply by suing for a refund of some earlier contribution. The result would distort the authority over religious doctrine and internal governance that, under *Serbian Eastern Orthodox Diocese, supra,* 426 U.S. at 708, is to be allocated *only* in accord with each church's own preferred decision-making structures. It would also inevitably "inhibit[] the free development of religious doctrine," *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449 (1969), by making every doctrinal departure or decree a temptation for civil litigation by every member or donor who preferred things as they were.

This latter threat is especially serious where, as here, the controversy fueling the litigation surrounds a religion's prediction of a second coming—of an earthly conflagration to be followed by heavenly salvation for those who have been faithful in word and deed to the religion's teachings. For every eschatological or millenialist religion—from Zoroastrianism to the early preachings of St. Paul, to the faith of the Jehovah's Witnesses to the fundamentalist evangelical Christianity of the Worldwide Church of God—continually reinterprets its eschaton, the Heaven on Earth toward which the religion aspires. Which interpretation is correct; whether prophesies of global destruction and messianic visitation are to be literally or metaphor-

ically understood"[65]; and whether, as correctly interpreted, the eschaton has come to pass—these are questions inherently theological, "questions . . . at the core of ecclesiastical concern." *Serbian Eastern Orthodox Diocese, supra,* 426 U.S. at 717. By permitting the resolution of such "ecclesiastical doctrines [to] measure legal right or wrong," *West Virginia State Board of Education* v. *Barnette, supra,* 319 U.S. at 654 (Frankfurter, J., dissenting), the courts below acted as would befit only the tribunals of "a theocratic state." *Id.* The judgment that ensued, confirming the verdict of a jury invited to "straighten out that Worldwide Church of God that keeps telling [people] the world's coming to an end . . . and then not coming to an end,"[66] superimposed a secular "conscience of the community"[67] upon the religious conscience of the Church and must be repudiated as profoundly alien to our constitutional order.

It bears repeating that the Church's objections go to the judgment below, to the approach by which it was reached, and to the constitutional dislocation thereby threatened—not to the *facial validity* of the doctrine of undue influence as such. The disregard of this fundamental distinction by the state's courts not only shapes the two reasons already set forth for granting the writ prayed for herein, but in fact gives rise to a third and independent reason for plenary review by this Court.

---

[65] *See United States* v. *Ballard, supra,* 322 U.S. at 94 (Jackson, J., dissenting) ("Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's Fables. . . . It is hard in matters so mystical to say . . . how far it is reliance upon a teacher's literal belief which induces followers to give him money."). *See also* 1 *Corinthians* 13:8 (King James) ("Charity never faileth: but whether there be prophesies, they shall fail. . . ."); *id.* at 13:9 ("For we know in part, and we prophesy in part.").

[66] T. 45.

[67] *Id.* at 62.

III.

The Courts Below Up-Ended Long-Settled Constitutional Doctrine by Refusing to Entertain the Church's First Amendment Challenge to the State's Undue Influence Rule *As Applied to It*, on the Ground That the Rule, *If Facially Valid*, Could Pose No Further Constitutional Problem.

Few propositions of constitutional law could be more elementary in theory, or more important in practice, than that a state statute or common law rule " 'may be held constitutionally invalid *as applied* when it operates to deprive an individual of a protected right although its *general validity* as a measure enacted in the legitimate exercise of state power is beyond question.' " *Little* v. *Streater*, 49 U.S.L.W. 4581, 4585 (U.S. June 1, 1981) (Burger, C.J., writing for a unanimous Court) (emphases added), quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971). Yet the trial court in this case rejected the Church's objection, under the First and Fourteenth Amendments, to the manner in which the undue influence doctrine was deployed against it *on the facts and record herein*—not by assessing and approving the actual application of that doctrine to such facts, but by observing simply that

> *there can be state regulation* of religious practices given the existence of a public interest and here Wisconsin's common law prohibition against the exercise of an undue influence in order to obtain a desired result is *a sufficiently compelling reason to protect state regulation of such conduct from First and Fourteenth amendment claims of religious freedom* . . . .[41]

Having suffered an adverse verdict and judgment in the trial court, the Church filed an appeal which, under Wis-

[41] App. 10a (emphasis added).

consin Statutes § 809.10(4), "brings before the [appellate] court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." The court below thus had before it not only the trial court's December 31, 1979, judgment against the Church on the merits, but also the trial court's ruling of August 16, 1979, rejecting the Church's pretrial request for "an order limiting the testimony [insofar as it] involves, or could involve . . . matters of religious doctrine." [69] Yet the Court of Appeals, simply refusing to address either that ruling or the proceedings that predictably ensued—proceedings in which matters of religious doctrine were paraded before the jury under an invitation to consider such matters in reaching its determination on undue influence[70]—was satisfied merely to observe that

> [t]he church, in common with every other person or organization, is *subject to the laws relating to undue influence.* There is *no exemption for a religious institution* to acquire property through undue influence. Likewise, the fact that one of the methods of compulsion, persuasion, or domination of the donor's mind consisted of religious indoctrination *does not exempt a donee* from the doctrine of undue influence.[71]

On this basis, and on this basis alone, the court below "conclude[d] that no valid first amendment issue can be raised from [the] judgment" of the trial court.[72] But to hold

---

[69] Transcript of Pre-Trial Hearing of August 16, 1979, at 2-3. *See* Appellants' Brief in Court of Appeals at 5; Defendants-Appellants' Reply Brief in Court of Appeals at 1 n. 2. *See* n. 73 *infra*.

[70] *See* pp. 5-7, 9-11 *supra*.

[71] App. 5a (emphases added).

[72] *Id.*

that "no valid first amendment issue can be raised" merely because a judgment implements a *facially valid* statutory or common law scheme from which religious groups and their activities enjoy *no blanket exemption*—the precise holding of the Court of Appeals in this case—is not only to forget that "the pinch of the [scheme] is in its application," *Terminiello* v. *City of Chicago*, 337 U.S. 1, 6 (1949), but also to repudiate this Court's oft-repeated teaching that a rule valid and wholly "neutral on its face may, in its application, nonetheless offend the constitutional requirement . . . if it unduly burdens the free exercise of religion" as applied. *Wisconsin* v. *Yoder*, *supra* 406 U.S. at 220 (compulsory school attendance laws); *Sherbert* v. *Verner*, *supra*, 374 U.S. at 403-05 (unemployment compensation rules); *Thomas* v. *Review Board*, *supra*, 101 S.Ct. at 1431 (same).

The Church in this case sought no "exemption [as] a religious institution"—no exemption of the sort that the court below itself proposed, and then dismissed, in its perfunctory treatment of the First Amendment issues tendered to it. The Church argued only that the trial court had abridged its First and Fourteenth Amendment rights by refusing on this record to limit inquiry into the truth or falsity of the Church's religious doctrines and by submitting the case to the jury in a posture which effectively invited that body both to conduct this forbidden inquiry and to rest its verdict on such an inquisition's outcome.[73] It was to this argument, challenging the undue influence doctrine *as applied to the Church in this case*, that

[73] *See* Appellants' Brief in Court of Appeals at 5, 26-28, 35-36, 40. The Church had indeed sought protection from that very risk as long ago as July 27, 1978, when in its Answer to McElroy's Complaint the Church asserted "[t]hat the real basis of Plaintiff's dispute with Defendants is a disagreement . . . over a matter of church doctrine, which does not amount to fraud, undue or unfair influence" (¶11), and which "requires the [trial] Court to involve itself in church doctrine . . . [in a manner] not cognizable or

the court below offered its plainly inadequate, and indeed wholly unresponsive, reply that the doctrine is valid *on its face* and is not *invariably* void when churches are accused.

Nor could that reply have been rescued by adding an argument to the effect that the jury's verdict in this case *might* have been arrived at on proper grounds. For it is established that, "where a jury's general verdict *may* have rested upon grounds improper for First Amendment reasons, a reviewing court will not pause to speculate whether

---

adjudicable by the court under the first amendment to the Constitution of the United States . . . ." (¶14). Unable to secure dismissal on that score at the outset, the Church on April 13, 1979, noticed a motion for summary judgment, to be made April 27, 1979, and pointed in its Supporting Memorandum to a deposition of McElroy, taken on November 20, 1978, to argue that it had by then become "plain that the gist of the problem is a difference in scriptural interpretation," Points and Authority (*sic*) in Support of Motion for Summary Judgment at 2; and that the proceedings anterior to any judgment for McElroy on these facts, as well as any such judgment itself, would unconstitutionally plunge "a civil court [into] disputes involving theology, liturgy, spiritual interpretation and the rating of a church's commitment to spreading the gospel." *Id.* at 4. *See also* Transcript of Pre-Trial Hearing of April 27, 1979, at 4. The trial court denied that motion from the bench. *Id.* at 8. *See also* Minute Order Denying Motion For Summary Judgment, July 5, 1979.

The Church, in a later attempt to narrow the objection's thrust by focusing on "testimony [that] involves . . . matters of religious doctrine," Transcript of Pre-Trial Hearing of August 16, 1979, at 2, then sought "an order limiting the testimony," *id.*, which the trial court also denied. *Id.* at 3.

At the close of the evidence, the Church renewed its attempt to dismiss, Trial Transcript, August 17, 1979, at 225, in part on the ground that no fraud or undue influence can be shown by proving "that these people believed the Bible, and their ministers." *Id.* at 228. *See also id.* at 235-36. The trial court nonetheless insisted on submitting the question of "undue influence" to the jury, *id.* at 236, although "dismiss[ing] that part of this case which is based on fraud or misrepresentation." *Id.* at 258.

From start to finish, therefore, the risk that any verdict against the Church in this proceeding could well represent the jury's mere disagreement with or distaste for the Church's religious beliefs was objected to by the Church but was treated as constitutionally immaterial by the trial court, which thus left the Church with no way to avoid that risk.

the jury's verdict was actually reached on other and permissible grounds." *Founding Church of Scientology* v. *United States, supra,* 409 F.2d at 1164 (*per curiam*) (denying petition for rehearing). *See Street* v. *New York,* 394 U.S. 576, 585-88 (1969); *Yates* v. *United States,* 354 U.S. 298, 311-12 (1957); *Cramer* v. *United States,* 325 U.S. 1, 36 n.45 (1945); *Williams* v. *North Carolina,* 317 U.S. 287, 292 (1942); *Stromberg* v. *California,* 283 U.S. 359, 367-68 (1931). And, in any event, the objection made herein goes not simply to the proceedings before the jury, to the jury's verdict, and to the trial court's resulting judgment, but also to the *ruling of the Court of Appeals itself,* which both embraced a substantively forbidden criterion of undue influence as set forth in Parts I and II *supra,* and subjected the Church to a procedurally unacceptable rule of "facial-only" judicial review under the First and Fourteenth Amendments.

CONCLUSION

In this case, as in the case of the New York law that sought to wrest control of a cathedral from a church hierarchy,[74] "[w]hat is at stake" is "not just a piece of real estate," but "the power to exercise religious authority."[75] To be sure, the land in Barron County deeded by McElroy to the Church, unlike the Saint Nicholas Cathedral, is not *itself* "the seat and center of ecclesiastical" power.[76] But it is not merely a farm, either. For that land was the subject of a religious offering by McElroy to his church—a "contribution [which itself] serve[d] as [an] expression

---

[74] *Kedroff* v. *Saint Nicholas Cathedral,* 344 U.S. 94 (1952) (invalidating the state statute). *Accord, Kreshik* v. *Saint Nicholas Cathedral,* 363 U.S. 190 (1960) (same result where state courts later attempted to transfer control by invoking common law).

[75] *Kedroff, supra,* 344 U.S. at 121 (Frankfurter, J., joined by Black and Douglas, JJ., concurring).

[76] *Id.*

of support" and solidarity.[77] And the claim for the land's return was but a lever through which McElroy induced the courts of Wisconsin to pry open the sacred precincts of church doctrine and belief—leaving a breach that must be rectified as to the Church, and allowed never to recur.

So, too, the fact that no-one is being "sent to *jail* because a jury in a hostile environment found [the] teachings [of his religion] false,"[78] "is . . . not the end[] of our inquiry."[79] Almost as surely as if criminal sanctions were being assessed, "little indeed would be left of religious freedom,"[80] were "[m]an's relation to his God made [the] concern"[81]—direct or indirect—of the state's apparatus (a) for resolving disputes over church property,[82] (b) for deciding whether and how such property should be distributed,[83] or (c) for determining which dona-

---

[77] *Buckley* v. *Valeo*, 424 U.S. 1, 21 (1976) (*per curiam*) (this is so even as to *political* contributions).

[78] *United States* v. *Ballard*, *supra*, 322 U.S. at 87 (emphasis added).

[79] *Sherbert* v. *Verner*, *supra*, 374 U.S. at 403-04 (footnote omitted). *See* n. 54 *supra*.

[80] *United States* v. *Ballard*, *supra*, 322 U.S. at 87.

[81] *Id.*

[82] *See Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, *supra*, 393 U.S. at 450-51. Indeed, in another suit for refund of religious donations, the Supreme Court of Japan, acting on the plea of defendant that the *Presbyterian Church* precedent be followed in construing Japan's counterpart of our own Religion Clauses (Japan Const. Art. XX), recently declared nonjusticiable a refund claim based on the alleged failure of another church's millenialist prophesy—there, that *Kosen Rufu* (the realization of universal Buddhist harmony) would arrive when (in 1972, as it turned out) Nicheren Buddhim's sacred *Dai Gohonzon* was enshrined in the Great Temple, *Sho Hondo*, at the foot of Mount Fuji. *See Matsumoto* v. *Soka Gakkai*, 1976 (O) No. 749 (No. 3 Petty Bench) (April 7, 1981).

[83] *See Terrett* v. *Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815) ("general principles common to our free institutions" bar state distribution of church property to church members deemed needy by the state).

tions of property to a church are, and which are not, in a donor's own "best interests." [14]

So that this Court may review a judgment in which all three of these encroachments appear, and may give due consideration to the dangers posed by heresy trials in the civil realm, the instant petition for a writ of certiorari should be granted.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Mass. 02138
(617) 495-4621

JAMES P. GERLACH
LAROWE & GERLACH
110 Main Street
Reedsburg, Wisconsin 53959
(608) 524-6444

THOMAS D. BELL
DOAR, DRILL & SKOW
103 North Knowles Avenue
New Richmond, Wisconsin 54017
(715) 246-2211

*Counsel for Petitioners**

June 15, 1981.

---

[14] *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 770 (First Amendment precludes such paternalism even as to purely commercial speech). *See* n. 34 & p. 17 at n. 59 *supra*.

* Petitioners acknowledge the assistance of David H. Remes (J.D. 1979) of Boston, Mass., in the preparation of this petition.

APPENDIX

APPENDIX A

Opinion of Wisconsin Court of Appeals

(Dated and Released December 16, 1980)

No. 80-283

STATE OF WISCONSIN

IN THE COURT OF APPEALS
DISTRICT III

GEORGE DANIEL MCELROY,

Plaintiff-Respondent,

v.

AMBASSADOR COLLEGE, WORLDWIDE CHURCH OF GOD, and the WORLD TOMORROW, a California corporation,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Barron county: FRED VAN SICKLE, Judge. *Affirmed.*

Before Donlin, P.J., Foley, J., and Dean, J.

PER CURIAM. The judgment appealed from declared null and void a Deed Reserving Life Estate in which McElroy donated his farm to the respondents [*sic*] (the Church). The judgment was based upon a jury verdict finding that the deed was the product of undue influence. The church appeals from the judgment arguing that insufficient evidence was adduced on each of the four elements of undue influence: [2] susceptibility, opportunity, disposition and coveted result. *In re Estate of Fechter,* 88 Wis.2d 199, 214, 277 N.W.2d 143, 150 (1979).

Appendix A

Undue influence must be proved by clear, satisfactory, and convincing evidence. When three of the four elements have been established by the required quantum of proof, only slight evidence of the fourth is required. *First Nat. Bank of Appleton* v. *Nennig*, 92 Wis.2d 518, 536, 285 N.W.2d 614, 623 (1979). On appeal, the findings of the jury will not be upset unless they are against the great weight and clear preponderance of the evidence. The court's task on appeal is to examine the record, not for facts to support a finding the trial court did not make or could have made, but for facts to support the finding the trial court did make. *In re Estate of Dejmal*, 95 Wis.2d 141, 154, 289 N.W.2d 813, 819 (1980). Upon our examination of the record in light of these principles, we conclude that sufficient evidence was adduced as to each element to sustain the finding of undue influence.

Susceptibility is established when it is proved that the donor was unusually receptive to suggestions of others and consistently deferred to them on matters of utmost personal importance. *Dejmal* [95 Wis.2d] at 156, 289 N.W.2d at [3] 820. McElroy had a seventh grade education. He had recently been through a divorce which he described as a "shock." He stated that he was looking for meaning in life when he joined the church.

McElroy testified that based upon what the church had told him, he had reduced his milking herd from thirty to twelve cows. He believed that he would be cursed if he disobeyed God, and that he had to give all to enter the Kingdom of God. He believed that the world would end in 1972, and followed the church's instructions so that he could be led to a place of safety during the holocaust.

McElroy signed a will modeled after a sample sent to him by the church. This will named as executors people

McElroy did not know. Later, in order to avoid probate, McElroy donated his farm by deed that was prepared by the church. McElroy testified that he did not know what "probate" meant at that time. He was also confused by the literature sent to him by the church and believed he could revoke the deed if he wished. He testified that he was "blinded with programming" by the literature sent by the church. From this testimony, and the jury's observations of McElroy, the jury could properly conclude that he was susceptible to undue influence.

[4] A reasonable jury might also have concluded that the church had ample opportunity to influence McElroy to donate his farm. Although most of this opportunity did not involve personal contact, the jury could reasonably find that the letters, literature, sermons, and occasional personal contact gave the church adequate opportunity to exert its will over McElroy. The church had advised McElroy to avoid contact with persons outside the church. Shortly before the will was signed, McElroy received numerous letters from the church, sometimes two or more in one day. McElroy testified that in making his will, he received all of his information from the church. In light of McElroy's relative isolation from other points of view and the volume of correspondence the church sent McElroy, sufficient evidence was adduced to allow the jury to conclude that the church's contacts with McElroy gave it sufficient opportunity to substitute its judgment for his.

The disposition of the church to unduly influence McElroy was proved by the active and guiding part it played in securing the deed. *See Kuehn* v. *Kuehn*, 11 Wis.2d 15, 22, 104 N.W.2d 138, 143 (1960). The initial suggestion to will the farm to the church was by Mr. Armstrong in a sermon. [5] The church then sent McElroy a sample will,

which he followed in all material respects. The church arranged a codicil to the will and, eventually, the deed reserving life estate. The church instructed McElroy not to seek assistance outside the church. Sufficient evidence of the church's aggressiveness in securing McElroy's property was presented to the jury to support its conclusion that the church was disposed to unduly influence McElroy.

The final element, coveted result, is also amply proved by the evidence. The test is not whether the result is natural or unnatural, but whether the result accomplished clearly appears to be the effect of the defendant's influence. *Kuehn* [11 Wis.2d] at 25, 104 N.W.2d at 144. The deed made the provisions of the will irrevocable. McElroy's testimony indicates that he did not understand the effect of what he had done, and stood to gain very little from the donation of his farm to the church. The decision to donate McElroy's farm by an irrevocable deed reserving life estate rather than leaving it to the church in his will was clearly the effect of the church's influence on him.

As stated in *Kuehn* [11 Wis.2d] at 24-25, 104 N.W.2d at 144:

> The acts of influence may be as varied as human conduct. Influence becomes undue when it commands or compels the exercise of [6] volition on the part of the person subject to such influence so that the result is the accomplishment of the will or purpose of the one using influence rather than, in fact, the will or purpose of the donor. The nature of the influence is in the form of mental persuasion or compulsion but not necessarily fear, which is the element of duress. The degree of persuasion which is unfair depends on a variety of circumstances. Both permissible influence and undue influence may induce a transaction. The distinction

> is whether the result was produced by influencing a freely exercised and competent judgment or by dominating the mind or emotions or the person susceptible to the influence.

McElroy's testimony was sufficient to allow a reasonable jury to find by clear, satisfactory, and convincing evidence that the deed was the product of undue influence by the church.

The church also argues on appeal that its first amendment rights were violated in this case. The judgment relates solely to the undue influence exercised by the church over McElroy. The church, in common with every other person or organization, is subject to the laws relating to undue influence. There is no exemption for a religious institution to acquire property through undue influence. Likewise, the fact that one of the methods of compulsion, persuasion, or domination of the donor's mind consisted of [7] religious indoctrination does not exempt a donee from the doctrine of undue influence. We conclude that no valid first amendment issue can be raised from this judgment.

By the Court—Judgment affirmed.

Publication in the official reports is not recommended.

APPENDIX B

Order of Wisconsin Supreme Court

SUPREME COURT

STATE OF WISCONSIN

Madison, March 16, 1981

No. 80-283 *McElroy* v. *Ambassador College, et al.*

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendants-appellants-petitioners Ambassador College, Worldwide Church of God, and the World Tomorrow, and considered by the court,

IT IS ORDERED that the petition is denied, with $50 costs.

CALLOW, J., did not participate.

MARILYN L. GRAVES
Clerk of Supreme Court

APPENDIX C

Memorandum Opinion of Barron County Circuit Court

STATE OF WISCONSIN
BARRON COUNTY CIRCUIT COURT
Case No. 78 CR 0287

[CAPTION OMITTED]

MEMORANDUM OPINION

The above was tried before a jury on August 16 and 17, 1979. Plaintiff was represented by Draw Ryberg of Eau Claire and defendants were represented by David Cusick of Barron.

The only question submitted to the jury was:

> Did any of the defendants in this case exercise undue influence upon the plaintiff, George Daniel McElroy, to obtain the deed for his farm in which he reserved a life estate?

The jury unanimously answered "yes" to the question.

Defendants have moved for a directed verdict in their favor. Plaintiff's attorney has asked for attorney fees in the amount of in excess of $2,000.

Defendants' motion for directed verdict in their favor is denied. Motion by plaintiff's attorney for attorney's fee[s] is denied and he is to receive only statutory attorney['s] fees from defendants.

Judgment on verdict in favor of plaintiff is granted.

Attorney for plaintiff may prepare Findings of Fact, Conclusions of Law and Judgment in accordance with the foregoing.

Dated 19 December 1979.

By the Court:

/s/ FRED VAN SICKLE
FRED VAN SICKLE, *Judge*

APPENDIX D

Order for Judgment of Barron County Circuit Court

STATE OF WISCONSIN

BARRON COUNTY CIRCUIT COURT

Case No. 78 CR 0237

[CAPTION OMITTED]

ORDER FOR JUDGMENT

The above entitled action having come on for trial on the 16th and 17th of August, 1979, before the Court and a Jury, and the Jury having made answer to one question in a Special Verdict, the plaintiff, George Daniel McElroy, appearing by Garvey, Anderson, Kelly & Ryberg, S.C. by J. Drew Ryberg, and defendants, Ambassador College, World Wide Church of God, and The World Tomorrow, California corporations, appearing by Liden, Cusick and Dobberfuhl, by David P. Cusick, and plaintiff George Daniel McElroy having moved for judgment pursuant to the Verdict, and the Court being fully advised in the premises,

IT IS ORDERED:

1. That the motion of the plaintiff for judgment on the Verdict rendered by the Jury August 17, 1979, is granted together with costs and disbursements.

2. That the motion of the plaintiff for actual attorneys' fees is denied and plaintiff is to receive only statutory attorneys' fees from defendants.

3. That the motion of the plaintiff that the Deed Reserving Life Estate of December 15, 1969, between plaintiff George Daniel McElroy and defendant Ambassador College

be declared null and void and that full title to the property be vested in plaintiff George Daniel McElroy, solely, is hereby granted.

4. That the defendants' motion for changing the answer to the question in the Verdict from Yes to No is denied, the Court having found ample credible evidence to sustain the Jury Verdict; that the defendants did exercise an undue influence upon the plaintiff to obtain the Deed for his farm in which he had reserved a life estate and further that the four elements necessary to prove undue influence were established by credible evidence:

(a) Plaintiff was susceptible of being unduly influenced by the defendants;

(b) Defendants did have the opportunity to exercise undue influence on plaintiff to obtain the improper favor;

(c) Defendants exhibited a disposition to influence unduly the plaintiff for the purpose of procuring the Deed in question; and

(d) The Deed itself was caused by or was the effect of the undue influence by the defendants upon the plaintiff.

5. That the motion of the defendants for a directed Verdict in their favor is denied for the reason [that] ample credible evidence supported the Jury Verdict that defendants exerted an undue influence upon the plaintiff to obtain the Deed Reserving Life Estate; defendants' motion for a directed Verdict on the theory that plaintiff's cause of action was barred as a matter of law because the statute of limitations had run or by the doctrine of laches is denied, the Court having found plaintiff's claim to have been timely

asserted; defendants' motion for directed Verdict on the theory that plaintiff's cause of action was outside the subject matter jurisdiction by [*sic*] the Court is hereby denied, the Court finding the First and Fourteenth amendment protections though guaranteed by the Constitution do not represent an unlimited and absolute freedom, there can be state regulation of religious practices given the existence of a public interest and here Wisconsin's common law prohibition against the exercise of an undue influence in order to obtain a desired result is a sufficiently compelling reason to protect state regulation of such conduct from First and Fourteenth amendment claims of religious freedom, and the Court thereby finds plaintiff's cause of action to be within the jurisdiction of the Court.

6. The motion of the defendants for a new trial on the theory that the Jury Verdict is contrary to law and the weight of the evidence and in the interest of justice is denied.

Dated this 28 day of December, 1979.

By the Court:

/s/ Fred Van Sickle
Fred Van Sickle
Circuit Court Judge for
Barron County

APPENDIX E

Judgment of the Barron County Circuit Court

STATE OF WISCONSIN

BARRON COUNTY CIRCUIT COURT

Case No. 78 CR 0287

[CAPTION OMITTED]

JUDGMENT

At a regular term of the Circuit Court for Barron County begun and held at the Courthouse in the City of Barron, Wisconsin, and on the 31st day of December, 1979, a day of and during said term, the Honorable Fred Van Sickle, present and presiding.

This action having come on for trial before the Court and a jury, and the plaintiff appearing by Garvey, Anderson, Kelly & Ryberg, S.C., by J. Drew Ryberg, his attorney, and the defendants Ambassador College, World Wide Church of God, and The World Tomorrow, appearing by Liden, Cusick and Dobberfuhl, by David P. Cusick, their attorneys, and the jury having rendered a Verdict herein on the 17th day of August, 1979, the Court having entertained Motions After Verdict, having held a hearing based on Motions After Verdict on October 16, 1979, and the Court having ordered Judgment as hereinafter provided.

NOW, THEREFORE, on motion of J. Drew Ryberg, one of the attorneys for the plaintiff, George Daniel McElroy,

IT IS ORDERED AND ADJUDGED:

1. That Judgment be granted in favor of plaintiff and against defendants declaring null and void that certain Deed Reserving Life Estate dated December 15, 1969, from

plaintiff George Daniel McElroy to defendant Ambassador College and that full title to the property as set forth in that Deed of December 15, 1969, namely, the Southeast Quarter of Section 11 in Township 33 North of Range 12 West in Barron County, State of Wisconsin, is hereby vested in plaintiff George Daniel McElroy solely; said Deed Reserving Life Estate hereby declared to be null and void has been recorded previously in Records, Volume 359, pages 249-250; and plaintiff recover costs and disbursements against the defendants in the sum of as taxed herein.

The names, post office addresses and occupations of the parties hereto are as follows:

1. The plaintiff, George Daniel McElroy, resides at Route 2, Barron, Wisconsin, in Barron County, Wisconsin, and he is a farmer.

2. The defendant, Ambassador College is a California corporation with its office and principal place of business located at 300 West Green Street, Pasadena, California, and Ambassador College, among other things, is an educational institution.

3. The defendant, World Wide Church of God, is a California corporation with its office and principal place of business located at 300 West Green Street, Pasadena, California, and the defendant World Wide Church of God is engaged in solicitation and fund raising activities, among other things, throughout the United States.

4. That the defendant, The World Tomorrow, is a radio and television broadcast produced by the defendant World Wide Church of God conducted from the business address

Appendix E

of the defendant World Wide Church of God, 300 West Green Street, Pasadena, California.

Dated this 31st day of December, 1979.

By the Court:

/s/ EFFIE BECKWITH
EFFIE BECKWITH, *Clerk*

APPENDIX F

Letter of February 28, 1973, from George McElroy to Ralph K. Helge, Esq.

[Trial Court Exhibit 21]

Route 2
Barron, WI 54812
February 28, 1973

Mr. Ralph Helge
Attorney at Law
285 West Green Street
Pasadena, CA 91105

Dear Mr. Helge:

This will acknowledge your letter of February 14, 1973.

Your letter states that the college and church is desirous of rectifying hardships, and more important, that it recognizes its legal and moral responsibilities to do so. All proper legal precepts must be based on moral precepts. All proper moral precepts must be based upon the foundation of truth, the Word of God.

No where in God's Word has evidence been found indicating a man's inheritance should be given to the church, or that the church should actively solicit a man's inheritance. In fact, God is very explicit as to how property should be handled. Nu. 27:7-11 indicates the line of inheritance. Nu. 36:7-9 provides that the inheritance shall not be removed from one tribe to another. Deut. 18:1-2 stipulates that the priests and Levites shall have no part nor inheritance with Israel. The ministers of the church have acknowledged that while there is no specific proof they are Levites there are certain indications that they are. They accept firstfruits, as outlined in Deut. 18:4 and other pas-

sages. If they accept firstfruits then they should also accept the stipulation of no inheritance. Ezek. 46:16-18 warns in verse 18 against the prince (Strong's No. 5387, an exalted one) taking the people's inheritance (Strong's No. 5159, occupance, gen. an estate) by oppression (Strong's No. 3238, by impl. to suppress or maltreat) to thrust them out of their possessions (Strong's No. 272, something seized, i.e., a possession, *esp. of land*) and that God's people be not scattered every man from his possession. The Revised Standard Version in this same passage states, "... so that none of my people shall be dispossessed of his property." Pro. 13:22 further indicates the inheritance is to go to the family. Pro. 20:21 issues a warning about obtaining an inheritance hastily in the beginning, and what is the end to an inheritance thus hastily obtained. In Acts 4 property was sold, but as has been pointed out in a number of sermons by ministers of the Worldwide Church of God this was a special situation to meet a given immediate emergency, and it was not a standard practice that was being followed.

At the Ozarks in 1969 it was suggested that the people in the congregation counsel about leaving their property to the church. Upon counsel I was naturally advised to follow the plan advocated by that group. I was in error in accepting such counsel without proving that the counsel was in accordance with God's Word (Psa. 119:24). The church was in error inasmuch as the counsel given was not in accordance with God's testimonies (Psa. 119:24). If the college and church is desirous of fulfilling its moral responsibilities it will rectify the situation it initiated by erroneous counsel. Therefore in view of the acknowledged

desire to pursue a path of moral responsibility I hereby request a reconsideration of the matter.

Since we have both erred in the matter the only moral and proper thing to do is to return the property so it can be handled in accordance with the will of God. For me to neglect to request this action would be a violation of my responsibility to my family. For the church to neglect to return the property would be an equal violation of its responsibility as an organization that acknowledges itself to be God's Church, and by such acknowledgment should be dedicated to fulfilling His will.

In light of the above a continued refusal to return the property will place an undue burden, and an unnecessary burden, on all parties concerned. Since it is the will of God that the inheritance be given to the family, then it behooves us to fulfill that will.

Since you did not answer the questions in my previous correspondence I again ask that you notify me of every place where the instruments involved have been recorded. In addition, I request that a *Certified Copy* of every executed instrument concerning this transaction be forwarded to me. May I have the pleasure of your acknowledgment that following God's will is of primary concern to Ambassador College and the Worldwide Church of God and that steps are being initiated to comply with that will?

Yours truly,

/s/ George McElroy
George McElroy

Office-Supreme Court, U.S.
FILED
JUL 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2124

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMBASSADOR COLLEGE, INC., WORLDWIDE CHURCH OF GOD, INC., and THE WORLD TOMORROW,

Petitioners,

vs.

GEORGE DANIEL McELROY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J. DREW RYBERG
GARVEY, ANDERSON, KELLY & RYBERG, S.C.
204 East Grand Avenue
P. O. Box 187
Eau Claire, WI 54702
(715) 834-3425
Counsel for Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

Under Wisconsin law that precludes the exercise of an undue influence to obtain property, may such common law be circumvented by shrouding one's impermissible conduct with the immunity of the First Amendment so as to obtain an absolute privilege?

More specifically:

1. Where a jury, Trial Court, and Court of Appeals for the State of Wisconsin, District III, have all unanimously held that the 1969 deed reserving a life estate to respondent clearly resulted from undue influence on the part of the petitioners such that their will was substituted for that of respondent causing him to deed to the petitioner Ambassador College his only valuable asset in the world, is there any real First Amendment question raised on such record?

2. Where a civil suit in a State Court revolves simply around factual matters related solely to a claim of undue influence, which claim is not premised upon doctrinal attack against a church, can such church or petitioners claim an absolute right to engage in any improper or unlawful conduct in the soliciting of funds, citing First Amendment protection?

TABLE OF CONTENTS

PAGE

Questions Presented i

Statement of the Case 1

I. The Court Of Appeals Properly Stated That No Valid First Amendment Issue Was Presented In The Lawsuit Because This Was A Factual Matter Related Only To A Claim Of Undue Influence And The Claim Was Not Premised Upon A Doctrinal Attack 7

II. No Federal Question Is Presented Warranting A Review Of The Decisions Below Because The Case Was Tried According To Established Wisconsin Law And Such Law And The Verdict Reached Are Constitutionally Permissible 8

Conclusion 15

INDEX TO APPENDICES

APPENDIX A—

Court of Appeals' Decision ..... App. 1

APPENDIX B—

February 8, 1973, letter from George Daniel McElroy to Ralph K. Helge ..... App. 6

TABLE OF AUTHORITIES

PAGE

CASES:

Estate of Hamm, 67 Wis. 2d 279, 227 N.W.2d 34 (1975) 11

In re Estate of Fechter, 88 Wis. 2d 199, 277 N.W.2d 143 (1979) 11

In re Estate of Kamesar, 81 Wis. 2d 151, 259 N.W.2d 233 (1977) 9

Kuehn v. Kuehn, 11 Wis. 2d 15, 104 N.W.2d 138 (1960) 12

United States v. Ballard, 322 U.S. 78 (1944) 7

MISCELLANEOUS:

Rule 19, U. S. SUPREME COURT RULES 8

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2124

AMBASSADOR COLLEGE, INC., WORLDWIDE CHURCH OF GOD, INC., and THE WORLD TOMORROW,

Petitioners,

vs.

GEORGE DANIEL McELROY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case involves undue influence by petitioners which led respondent to convey a remainder in his farm. That occurred in 1969. Respondent was caused to substitute their judgment for his and wound up deeding the remainder interest in his only valuable asset to the Ambassador College. A trial was had on the theory of undue influence. A jury returned a verdict favorable to McElroy in August, 1979. Judgment was granted pursuant to the verdict voiding that deed, and such judgment was appealed to the Court of Appeals and later affirmed. (See Appendix "A": Court of Appeals' Decision.)

George Daniel McElroy is a poor, old farmer from Barron County, Wisconsin. He is unsophisticated and uneducated. He completed only the seventh grade in school and had no other formal training (Trial Transcript, ("T"), P. 4). After seventh grade, McElroy left school to run the family farm (T., P. 4). McElroy continued to farm in the 1930's and also drove truck during two periods of his adult life. During World War II he served in a munitions plant for a year.

McElroy had married and was the father of three children. In 1960, in Minnesota, divorce proceedings were instituted by his wife. A period of great emotional tumult ensued. McElroy was in a state of shock over this. In 1961, divorced, he moved back to Barron County, Wisconsin, and has resided there ever since (T., P. 8).

Seeking order in his life, McElroy began to listen to radio programs, including those of the petitioner organizations, all of which are California corporations (T., P. 9). First contact with petitioners came in 1962 or 1963.

Following contact with the petitioners, McElroy began to contribute money to the petitioners. Prior to being baptized and up until 1970, he was actively involved in a correspondence course being offered by petitioners (T., Pp. 12-13, See Exhibit "1" of the Trial Record).

McElroy attended services in the Twin Cities area. In 1966, representatives of petitioners visited him (T., Pp. 18-20). McElroy was encouraged to move from his dairy farm into the City to be nearer to the church (T., P. 20). Further, McElroy was told to reduce the size of his herd so that he could conform to church guidelines on milking cows on the Sabbath (T., Pages 18-20). Consistent with the directive from petitioners, McElroy cut the size of his herd from thirty (30) to fifteen (15) or sixteen (16) cows, with only twelve (12) milking cows (T., Pp. 18-20).

McElroy fulfilled further conditions precedent to becoming a member of the petitioner organizations and was baptized in June, 1967 (T., P. 18). Thereafter, McElroy continued making relatively substantial cash contributions. (See Exhibits 24-26, Trial Record, McElroy's income tax returns.) Furthermore, McElroy dutifully followed the tithing program set forth by the petitioners wherein three (3) tithes were sought. Each was to represent ten (10) percent of the net income for a farmer (T., P. 17). In this time (1960's), McElroy contributed $7,000.00 to $8,000.00 to petitioners (T., Pp. 54-55, See Exhibits 17 and 18, Trial Record). McElroy attended the church services every Saturday in the Twin Cities area and annually attended the Feast of the Tabernacles (T., Pp. 29-30).

In October, 1969, McElroy attended the Feast of the Tabernacles at the Ozarks, Missouri (T., P. 30). Herbert Armstrong, founder of the Worldwide Church of God, made a presentation to members in attendance that Wills might be drafted to benefit petitioners, particularly the Ambassador College. That entity is the teaching arm for petitioner organizations (T., Pp. 32-33, 113). In attendance at the Festival that October, 1969, was Attorney Ralph K. Helge, an attorney on behalf of petitioners. Referral was made by Armstrong to Attorney Helge who was there to assist and provide basic Will information for bequests to the petitioners. Attorney Helge was and is a full-time employee of the petitioner organizations (T., P. 175). McElroy made contact with Helge at the conference, and Helge retained his name and thereafter forwarded significant amounts of correspondence to McElroy (T., Pp. 33-34).

There then ensued significant contact between petitioners and respondent from October 23, 1969, until December 15, 1969—the date when the remainder interest was con-

veyed by respondent. These contacts and dates will be treated *seriatim*.

October 23, 1969: Lawyer Helge, attorney for petitioners, forwarded letter, sample Will, and basic Will information to McElroy, also providing procedures to bypass probate, and a questionnaire eliciting basic Will information (T., P. 34, Exhibit 3, Trial Record).

November 1, 1969: Will was executed by McElroy leaving everything to the Ambassador College; Will signed at the request of Lawyer Helge; Will virtually identical to the sample Will forwarded October 23, 1969, by petitioners' lawyer, the only difference being name changes regarding testator and executors, although executors were proposed by petitioners through their lawyer, Ralph Helge; McElroy never met or communicated with the executors either before or after November 1, 1969 (T., Pp. 35-36, 179, 115).

November 5, 1969: Two more letters sent by Attorney Helge, one representing a "thank you" letter on the Will and the other providing an inventory which McElroy had to fill out so that petitioners would be apprised of all of McElroy's holdings (T., Pp. 38-39, Exhibits 5 and 6, Trial Record).

At Attorney Helge's request, McElroy did inventory all of his property, disclosing all of his assets, including his real property—a 160-acre farm in Barron County, Wisconsin (T., Pp. 39-40, Exhibit 7, Trial Record). It is undisputed that such real estate represented McElroy's only significant asset.

November 6, 1969: Letter from Attorney Helge to McElroy outlining basic procedures to bypass probate containing Declaration of Trust document with respondent's name on it (T., Pp. 40-42, Exhibit 8, Trial Record).

Shortly thereafter, a selection or option letter regarding handling of real estate was forwarded to McElroy (Exhibit 9, Trial Record). A Deed Reserving Life Estate was one of the options available in the giving of real estate. McElroy believed that the Declaration of Trust, which was cancellable, applied to the real estate selection he made and returned (T., Pp. 41-44).

Attorney Helge wrote again on November 7, 1969, advising as to donations regarding securities. That was followed by a securities election letter for McElroy to elect the appropriate method of giving his securities to the Ambassador College (T., Pp. 45-46, Exhibits 10 and 11). An inventory relative to securities was directed to McElroy after that (T., P. 46, Exhibit 12, Trial Record). Attorney Helge wrote again on November 10, 1969, providing more documentation on gifts to the petitioners. Again, a copy of the Declaration of Trust was forwarded (T., P. 46, Exhibit 13, Trial Record).

Confused by the vast array of literature from the petitioners, McElroy wrote to Attorney Helge on December 4, 1969, looking for assistance. By letter dated December 9, 1969, Attorney Helge responded, telling McElroy to seek help in his locality (T., Pp. 48-50, Exhibits 14 and 15, Trial Record).

Yet those in the Worldwide Church of God had been instructed that if they had any questions of a legal or financial nature, they were to be answered within the church (T., Pp. 192-193, 201-202).

Then, Attorney Helge, on behalf of petitioners, drafted and forwarded to McElroy the Deed Reserving Life Estate. McElroy signed this on December 15, 1969. Legal assistance from anybody outside the church was not sought by McElroy before signing the deed.

McElroy testified he believed the Declaration of Trust which had been provided by Attorney Helge meant that the deed was revocable, much like a Will. That trust document contained a cancellation clause making it revocable at any time at the grantor's request. In addition, McElroy felt that the Declaration of Trust had the added advantage of providing for an immediate income tax savings. Such savings were not great in light of the extremely modest income that McElroy had (See Exhibits 24-26, Trial Record).

McElroy continued to be involved in the church from 1969 until 1972. In early 1973, McElroy wrote to Attorney Helge trying to cancel the Declaration of Trust and seeking a return of the remainder interest in the property (Appendix B, Letter of McElroy to Attorney Helge dated February 8, 1973; also Exhibit 20, Trial Record). Letters addressed to Attorney Helge had been drafted by William Steventon (T., P. 61). In response, Attorney Helge stated that the deed would not be returned, and it was at this point that McElroy first found that the Declaration of Trust was not to apply to the deed even though he was induced to believe that it so applied.

McElroy testified that his thinking had been guided, indeed, programmed, by petitioners. In effect, petitioners' judgment through Attorney Helge was being substituted for his own (T., Pp. 44, 45, 196). Disassociated from the church in 1973, McElroy became aware for the first time that undue advantage had been taken of him; and he then sought return of the remainder interest in the property through the instant civil action.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY STATED THAT NO VALID FIRST AMENDMENT ISSUE WAS PRESENTED IN THE LAWSUIT BECAUSE THIS WAS A FACTUAL MATTER RELATED ONLY TO A CLAIM OF UNDUE INFLUENCE AND THE CLAIM WAS NOT PREMISED UPON A DOCTRINAL ATTACK.

McElroy believes that the First Amendment is being cited by the petitioners because they are groping hopelessly for an issue before the United States Supreme Court. Petitioners are trying to grant unto themselves an absolute privilege to do anything they like in soliciting funds. While petitioners are free to believe and espouse whatever they like, they are not free to *do* whatever they like; and their actions must be consistent with the law. Petitioners attempt to arrogate to themselves a place beyond the reach of the law; and, clearly, that is not the purpose of the First Amendment.

The only issue in the case is whether George Daniel McElroy was unduly influenced into giving the petitioners his property. Evidence of the undue influence was directed to petitioners' methods, particularly those of their lawyer, Helge, not to the content of their religious beliefs. This is consistent with the permissible scope of inquiry set forth in *United States* v. *Ballard,* 322 U.S. 78 (1944).

The Court of Appeals rightly determined that the four (4) elements necessary in an undue influence case in the State of Wisconsin had been proved. These are suscepti-

bility, opportunity to influence, disposition to influence, and coveted result. They were proved by the appropriate evidentiary standard—clear, convincing, and satisfactory evidence. The conduct appropriately relied upon by the Court of Appeals in stating that undue influence had been proved was that between October 23, 1969, and December 15, 1969. In that time, doctrinal disputes played no part in proving that the gifts to petitioners were obtained through undue influence.

Respondent, George Daniel McElroy, respectfully submits that no doctrinal attack issued here. The facts of the case are so clear that a doctrinal attack would only cloud the proof of the undue influence exercised by the petitioners in obtaining McElroy's property. What is attacked is that via reams of correspondence and solicitation, petitioners were able to get respondent to execute a Will in November of 1969 leaving everything to the Ambassador College. Thereafter, by means of the inventory that had been sent to the respondent, petitioners were able to find out that respondent had a valuable asset; namely, his real property in Barron County, Wisconsin; and then petitioners sought to insure that such property would be tied up permanently by means of a Deed Reserving Life Estate.

II.

NO FEDERAL QUESTION IS PRESENTED WARRANTING A REVIEW OF THE DECISIONS BELOW BECAUSE THE CASE WAS TRIED ACCORDING TO ESTABLISHED WISCONSIN LAW AND SUCH LAW AND THE VERDICT REACHED ARE CONSTITUTIONALLY PERMISSIBLE.

No adequate reason consistent with the grounds set forth in Rule 19, *U. S. Supreme Court Rules,* has been presented by petitioners to justify review of the matter. Peti-

tioners have sought to cloud the issue creating the straw man of the First Amendment to get some type of Federal question before the Court.

A review of the statement of the case indicates succinctly the factual underpinnings for the Court of Appeals' ruling. Close scrutiny of the time period November 1, 1969, through December 15, 1969, leads very strongly to the conclusion of undue influence without reference to any First Amendment claim on the part of the petitioners. Petitioners allege that absent egregious fraud or force, no claim of undue influence ever could be asserted against any religious entity. What petitioners appear to be arguing is that the evidence was not legally sufficient to sustain a finding of undue influence. That certainly is not a Federal question and is a State matter that is to be resolved by the State Courts.

Undue influence is an established Wisconsin theory. Its methods of proof are either proving the elements that the Wisconsin Supreme Court had said show undue influence: (1) susceptibility to undue influence, (2) opportunity to influence, (3) disposition to influence, and (4) coveted result; or proving the existence of: (1) a confidential relationship between the donor or testator and the favored beneficiary and (2) suspicious circumstances surrounding the making of the gift or will. *In re Estate of Kamesar,* 81 Wis. 2d 151, 158-159, 259 N.W.2d 233 (1977). McElroy's proof followed the first approach although the evidence at trial, particularly with respect to Attorney Helge's conduct, supported either position.

McElroy's proof of susceptibility was his lack of education and sophistication, his slavish following of all Attorney Helge's instructions in the critical period of mid October through December 15, 1969, his providing of a re-

mainder interest shortly after making a Will that left all to Ambassador College, and his general gullibility which was last witnessed by the trier of fact in August, 1979.

Petitioners had ample opportunity to influence McElroy as witness his contributions, his participation in a massive self study—some seven handwritten volumes long—his reduction of his dairy herd (his only livelihood), and his careful adherence to anything presented by the church or Attorney Helge. Petitioners had and took nearly every opportunity to influence McElroy so as to obtain an improper and unnatural favor.

Petitioners' disposition to influence McElroy is seen in their efforts to tie up McElroy's real property through the gift of the remainder interest. Not content with the Will that gave them everything, petitioners, through Attorney Helge, wanted an irrevocable lock on his land and obtained it through the guise of Declaration of Trust, income tax advantages (which could scarcely be less significant for a man of McElroy's most meager resources), and avoidance of probate costs. Attorney Helge sent substantial amounts of correspondence to induce and dispose McElroy to make the gift which was barely six weeks after Attorney Helge had elicited a Will that left all to petitioners and disinherited McElroy's three children.

Coveted result is plainly seen in the remainder interest which tied up McElroy's land immediately. What value is there to a life estate of a person age 68 should McElroy decide to sell it? Why were petitioners not able to wait until McElroy passed away before obtaining the land, lest they believe he would come to his senses and change his Will?

The Court of Appeals reviewed such elements and found that sufficient evidence was adduced as to each element to

sustain the finding of undue influence (App. A, P. 2). The appropriate degree of proof is clear, satisfactory, and convincing evidence. *In re Estate of Fechter*, 88 Wis. 2d 199, 277 N.W.2d 143 (1979). A finding by the Trial Court on the issue will not be upset on appeal unless it is against the great weight and clear preponderance of the evidence. On appeal, the Court examines the record, not for facts to support a finding the Trial Court did not make or could have made, but for facts to support the finding the Trial Court did make. *Estate of Hamm*, 67 Wis. 2d 279, 282, 227 N.W.2d 34 (1975).

Petitioners assert no constitutional defect in the jury instructions. The critical instruction pertains to undue influence:

> "To establish undue influence, four elements must be proved:
>
> 1. A person who is susceptible of being unduly influenced by the person charged with exercising undue influence;
>
> 2. The opportunity of the person charged to exercise such influence on the susceptible person to procure the improper favor;
>
> 3. A disposition on the part of the party charged, to influence unduly such susceptible person for the purpose of procuring an improper favor either for himself or another;
>
> 4. A result caused by, or the effect of such undue influence.
>
> Stated simply, it is susceptibility, opportunity to influence, disposition to influence and desired result by the defendants.
>
> The acts of influence may be as varied as human conduct. Influence becomes undue when it commands or compels the exercise of volition on the part of the

person subject to such influence so that the result is the accomplishment of the will or purpose of the one using influence rather than, in fact, the will or purpose of the Donor. The nature of the influence is in the form of mental persuasion or compulsion but not necessarily fear, which is the element of duress. The degree of persuasion which is unfair depends on a variety of circumstances. Both permissible influence and undue influence may induce a transaction. The distinction is whether the result was produced by influencing a freely exercised and competent judgment or by dominating the mind or emotions of the person susceptible to the influence.

You are, therefore, to consider the conduct of the plaintiff and the defendants in deciding whether undue influence was placed upon George Daniel McElroy. If you are satisfied by evidence which is clear and satisfactory that there was such undue influence, then you must answer question 1 'Yes.' "

That instruction is premised upon established Wisconsin case law. *Kuehn* v. *Kuehn*, 11 Wis. 2d 15, 104 N.W.2d 138 (1960). It sets forth an appropriate extrinsic and neutral test regarding analysis of methods used to compel action.

Whether undue influence was exercised by petitioners is a question of fact which has been resolved by a jury, and in turn endorsed by the Trial Court and later the Court of Appeals. Petitioners' attack, again couched in terms of the First Amendment, is simply a veiled sufficiency of the evidence approach. Where the law followed by the jury is constitutionally sound and the record is replete with evidence supporting the four elements of undue influence, further review of essentially factual disputes is unnecessary and clearly not reflective of any Federal question or constitutional issue worthy of review.

Much of the petition represents a constitutional essay on the First Amendment. Specific references are made to the record only to excoriate McElroy's counsel for something that he might have said in opening or closing. In the questions presented, petitioners have in great flowery language maintained McElroy's counsel tried this as a heresy trial. Beyond those wild assertions, petitioners do not point specifically to the record in support of their thesis, only relying upon the tone of McElroy's counsel in opening and closing. All such references to McElroy's counsel's remarks have been taken out of context. Second, none rises to the level of any constitutional issue before this Court. Third, if the remarks themselves were objectionable, they could have been objected to during the time of trial; and they never were. Fourth, the jury is particularly instructed that the arguments of counsel do not represent evidence and are not to be regarded as such and only used by them in aid of interpreting the evidence. The Trial Judge's specific admonition was:

> "You should consider carefully the arguments of counsel insofar as such arguments are based upon the evidence and insofar as such arguments will assist you in arriving at a just verdict. But the arguments and statements of counsel and their conclusions and opinions are not to be considered by you as evidence in this case. It is your duty to draw your own conclusions and your own inferences from the evidence and to decide upon your verdict according to the evidence and under the instructions concerning the law as given to you by the Court."

Finally, this matter has been reviewed enough and remains what it started as, a unique factual situation dealing with a claim of undue influence, unrelated to any assertion by McElroy that doctrine caused him to make the

deed. What caused McElroy to make the deed was all the communication between November and December of 1969 by Attorney Helge leading McElroy to believe that Helge was his attorney, causing him to conclude that the Declaration of Trust would be like a Will, causing him to believe that he would have the opportunity for an income tax advantage and at the same time have a Will substitute. The remainder interest concept is a complicated tool even to the typical lawyer and mind boggling to a poor, old dairy farmer who did not even know what "probate" meant.

These First-Amendment claims have been aired by petitioners previously. Summary judgment was attempted by petitioners and failed. That issue was appealed to the Court of Appeals before the actual trial of the matter but denied. After trial in Motions After Verdict, petitioners again raised the issue of the First Amendment. That attack failed. On appeal to the Court of Appeals, petitioners relied heavily upon the First Amendment; and that issue was thoroughly and completely briefed before that Court. The Court of Appeals concluded that the First Amendment really was not an issue here; rather, it was a simple case on relatively straightforward facts dealing with an issue in the common law of Wisconsin; namely, undue influence. Doctrinal attack, religious indoctrination, zeal and fervor are sought to be introduced by the petitioners for the simple reason of attempting to upset the jury verdict, with petitioners realizing they can mount no challenge against it on a factual or evidentiary basis. After review by the Court of Appeals, petitioners sought review by the Wisconsin Supreme Court, again on First Amendment grounds. That petition was rejected.

CONCLUSION

Not one of the appellate reviews in this matter has been published. None of the opinions below carry any precedential value. This case represents a long and ugly effort by petitioners to introduce the First Amendment into a case where it has no place.

Therefore, it is respectfully prayed that the Petition for Certiorari be denied and that petitioners' war of attrition against a poor and old George McElroy be ended. For the evidence at trial clearly and convincingly established that McElroy was completely susceptible to an undue influence, that petitioners had the opportunity and were disposed to take advantage of a person like McElroy, and the coveted result of the remainder interest in the property was completely consistent with petitioners' course of conduct which was calculated to fleece George Daniel McElroy's flock.

Respectfully submitted,

J. Drew Ryberg
Garvey, Anderson, Kelly & Ryberg, S.C.
204 East Grand Avenue
P. O. Box 187
Eau Claire, WI 54702
(715) 834-3425
Counsel for Respondent

APPENDIX

APPENDIX A

COURT OF APPEALS DECISION
Dated and Released December 16, 1980

STATE OF WISCONSIN

IN THE COURT OF APPEALS — DISTRICT III

No. 80-283

GEORGE DANIEL McELROY,

Plaintiff-Respondent,

v.

AMBASSADOR COLLEGE, WORLDWIDE CHURCH OF GOD, and the WORLD TOMORROW, a California Corporation,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Barron county: FRED VAN SICKLE, Judge. *Affirmed.*

Before Donlin, P.J., Foley, J., and Dean, J.

PER CURIAM. The judgment appealed from declared null and void a Deed Reserving Life Estate in which McElroy donated his farm to the respondents (the Church). The judgment was based upon a jury verdict finding that the deed was the product of undue influence. The church appeals from the judgment arguing that insufficient evidence was adduced on each of the four elements of undue influence: susceptibility, opportunity, disposition and coveted result. *In re Estate of Fechter,* 88 Wis.2d 199, 214, 277 N.W.2d 143, 150 (1979).

Undue influence must be proved by clear, satisfactory, and convincing evidence. When three of the four elements have been established by the required quantum of proof, only slight evidence of the fourth is required. *First Nat. Bank of Appleton* v. *Nennig*, 92 Wis.2d 518, 536, 285 N.W.2d 614, 623 (1979). On appeal, the findings of the jury will not be upset unless they are against the great weight and clear preponderance of the evidence. The court's task on appeal is to examine the record, not for facts to support a finding the trial court did not make or could have made, but for facts to support the finding the trial court did make. *In re Estate of Dejmal*, 95 Wis.2d 141, 154, 289 N.W.2d 813, 819 (1980). Upon our examination of the record in light of these principles, we conclude that sufficient evidence was adduced as to each element to sustain the finding of undue influence.

Susceptibility is established when it is proved that the donor was unusually receptive to suggestions of others and consistently deferred to them on matters of utmost personal importance. *Dejmal* at 156, 289 N.W.2d at 820. McElroy had a seventh grade education. He had recently been through a divorce which he described as a "shock." He stated that he was looking for meaning in life when he joined the church.

McElroy testified that based upon what the church had told him, he had reduced his milking herd from thirty to twelve cows. He believed that he would be cursed if he disobeyed God, and that he had to give all to enter the Kingdom of God. He believed that the world would end in 1972, and followed the church's instructions so that he could be led to a place of safety during the holocaust.

McElroy signed a will modeled after a sample sent to him by the church. This will named as executors people McElroy did not know. Later, in order to avoid probate, McElroy donated his farm by deed that was prepared by

the church. McElroy testified that he did not know what "probate" meant at that time. He was also confused by the literature sent to him by the church and believed he could revoke the deed if he wished. He testified that he was "blinded with programming" by the literature sent by the church. From this testimony, and the jury's observations of McElroy, the jury could properly conclude that he was susceptible to undue influence.

A reasonable jury might also have concluded that the church had ample opportunity to influence McElroy to donate his farm. Although most of this opportunity did not involve personal contact, the jury could reasonably find that the letters, literature, sermons, and occasional personal contact gave the church adequate opportunity to exert its will over McElroy. The church had advised McElroy to avoid contact with persons outside the church. Shorty before the will was signed, McElroy received numerous letters from the church, sometimes two or three in one day. McElroy testified that in making his will, he received all of his information from the church. In light of McElroy's relative isolation from other points of view and the volume of correspondence the church sent McElroy, sufficient evidence was adduced to allow the jury to conclude that the church's contacts with McElroy gave it sufficient opportunity to substitute its judgment for his.

The disposition of the church to unduly influence McElroy was proved by the active and guiding part it played in securing the deed. *See Kuehn* v. *Kuehn,* 11 Wis.2d 15, 22, 104 N.W.2d 138, 143 (1960). The initial suggestion to will the farm to the church was by Mr. Armstrong in a sermon. The church then sent McElroy a sample will, which he followed in all material respects. The church arranged a codicil to the will and, eventually, the deed reserving life estate. The church instructed McElroy not to seek assistance outside the church. Sufficient evidence of

the church's aggressiveness in securing McElroy's property was presented to the jury to support its conclusion that the church was disposed to unduly influence McElroy.

The final element, coveted result, is also amply proved by the evidence. The test is not whether the result is natural or unnatural, but whether the result accomplished clearly appears to be the effect of the defendant's influence. *Kuehn* at 25, 104 N.W.2d at 144. The deed made the provisions of the will irrevocable. McElroy's testimony indicates that he did not understand the effect of what he had done, and stood to gain very little from the donation of his farm to the church. The decision to donate McElroy's farm by an irrevocable deed reserving life estate rather than leaving it to the church in his will was clearly the effect of the church's influence on him.

As stated in *Kuehn* at 24-25, 104 N.W.2d at 144:

> The acts of influence may be as varied as human conduct. Influence becomes undue when it commands or compels the exercise of volition on the part of the person subject to such influence so that the result is the accomplishment of the will or purpose of the one using influence rather than, in fact, the will or purpose of the donor. The nature of the influence is in the form of mental persuasion or compulsion but not necessarily fear, which is the element of duress. The degree of persuasion which is unfair depends on a variety of circumstances. Both permissible influence and undue influence may induce a transaction. The distinction is whether the result was produced by influencing a freely exercised and competent judgment or by dominating the mind or emotions of the person susceptible to the influence.

McElroy's testimony was sufficient to allow a reasonable jury to find by clear, satisfactory, and convincing evidence that the deed was the product of undue influence by the church.

The church also argues on appeal that its first amendment rights were violated in this case. The judgment relates solely to the undue influence exercised by the church over McElroy. The church, in common with every other person or organization, is subject to the laws relating to undue influence. There is no exemption for a religious institution to acquire property through undue influence. Likewise, the fact that one of the methods of compulsion, persuasion, or domination of the donor's mind consisted of religious indoctrination does not exempt a donee from the doctrine of undue influence. We conclude that no valid first amendment issue can be raised from this judgment.

By the Court.—Judgment affirmed.

APPENDIX B

Rt 2
Barron, WI 54812
February 8, 1973

Mr. Ralph Helge, Attorney
At Law
205 West Green St.
Pasadena, CA 91105

Dear Mr. Helge:

This will acknowledge receipt of the instrument requested by my son, Howard McElroy. Thank you for forwarding this to me.

Since I am no longer affiliated with the Worldwide Church of God I hereby request that the agreement transferring my property to the church upon my death be cancelled.

Please return all appropriate documents covering this transaction to me at the above address. If any of these instruments have been recorded in any municipal district please advise in which district they were recorded, and the date on which subsequent cancellation was recorded in each district.

Your cooperation in this matter will be appreciated.

Yours truly,
George Mc Elroy

Office - Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS

No. 80-2124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMBASSADOR COLLEGE, INC., *et al.*,
Petitioners,

v.

GEORGE DANIEL MCELROY,
Respondent.

REPLY BRIEF OF PETITIONERS

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Mass. 02138
(617) 495-4621

JAMES P. GERLACH
LAROWE & GERLACH
110 Main Street
Reedsburg, Wisconsin 53959
(608) 524-6444

THOMAS D. BELL
DOAR, DRILL & SKOW
103 North Knowles Avenue
New Richmond, Wisconsin 54017
(715) 246-2211

Counsel for Petitioners

TABLE OF CONTENTS

PAGE

Introduction 1

ARGUMENT 1

I. McElroy Has Advanced No Basis for Divesting the Church of Title to the Property He Donated Other Than the "Undue Influence" Supposedly Evidenced by His Very Adherence to the Church's Precepts and Practices 1

II. McElroy Has Failed to Defend the Use of His Religious Beliefs and Actions by the Courts Below to Prove "Undue Influence" by Petitioners, *or* to Justify the Court of Appeals' Disregard of the Substantial Risk That the Jury's Verdict Rested on Grounds Forbidden by the Religion Clauses 4

CONCLUSION 5

No. 80-2124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMBASSADOR COLLEGE, INC., *et al.*,
Petitioners,

v.

GEORGE DANIEL MCELROY,
Respondent.

REPLY BRIEF OF PETITIONERS

Introduction

Pursuant to Rule 22.5 of the Rules of this Court, petitioners Ambassador College, Inc., *et al.*, file this brief in reply to respondent McElroy's Brief in Opposition to Petition for A Writ of Certiorari, filed with this Court on July 15, 1981.[1]

ARGUMENT

I.

McElroy Has Advanced No Basis for Divesting the Church of Title to the Property He Donated Other Than the "Undue Influence" Supposedly Evidenced by His Very Adherence to the Church's Precepts and Practices.

For all of McElroy's unsupported innuendos as to the "methods" by which petitioners "were able to get" him

---

[1] Petitioners will sometimes be referred to herein collectively as "the Church." *See* Petition at 1 n.1 (identifying petitioners individually).

to deed his farm to them "via reams of correspondence and solicitation," [2] McElroy confirms petitioners' contention that it was *not* any finding of force, fraud, or some other unlawful *means* of inducing the donation, but rather the *mere fact of McElroy's acceptance of church doctrine,* and the *mere fact of his willingness to act on his faith* by contributing his farm to the Church, that caused the courts below to treat "poor, old farmer" McElroy [3] as the hapless victim of "undue influence" by petitioners, and hence to nullify the deed for the farm and to revest in McElroy full title thereto.

Thus, apart from his limited formal education and supposed "lack of . . . sophistication," [4] McElroy's "susceptibility to undue influence" is said to have been shown only by (a) the very deeding of his farm to the Church,[5] (b) his *decision* to deed it as he did (*i.e.*, McElroy's "slavish following of all Attorney Helge's instructions" [6]), and (c)

---

[2] Brief in Opposition ("Opp.") at 7-8.

[3] *Id.* at 2.

[4] *Id.* at 9. *But see* Petition at 3 & n.3 (noting considerable business experience of McElroy, including service as section coordinator in National Farmers Organization and establishment of successful plan to increase income of member cattlemen in region).

[5] Opp. at 9-10.

[6] *Id.* at 9. *But see* Petition at 16 n.53 (noting that McElroy had *refused* to follow at all—much less "slavishly"—the Church's recommendation that he sell his farm and move to the city to be nearer to the Church). Nothing either in the record or in McElroy's Brief in Opposition bears out his repeated suggestions of questionable conduct on the part of Church counsel Helge. To the contrary, as McElroy himself notes, the record shows that Helge counselled McElroy to obtain outside advice in his dealings with the Church. Opp. at 5. And, as noted in the petition, McElroy himself emphasized that "[n]obody had influence over me, I did what I wanted to do." Petition at 7 & n.26. McElroy's spurious attack on counsel Helge's "methods," Opp. at 7, thus cannot obscure the grave constitutional issues in this case.

8

"his general guillibility which was best witnessed by the trier of fact in August 1979" [7]—to wit, McElroy's belief in the dogma and prophecies of the Church.[8] And petitioners' "opportunity to influence McElroy" is said to have been shown only by (a) his contributions to the Church,[9] (b) "his participation in a massive self study," [10] (c) his reduction of his herd in keeping with church teachings,[11] and (d) "his careful adherence to anything presented by the Church or [its attorney]." [12]

In short, it was the mere fact "[t]hat McElroy believed—and acted in accord with his belief—[that] became . . . *proof in itself* that his mind had been 'dominated' by the Church." [13] Far from advancing in this Court "simply a veiled sufficiency of the evidence approach," [14] petitioners challenge as fundamentally antagonistic to the First and Fourteenth Amendments the use by the courts below of McElroy's religious beliefs and actions thereon as *the* proof that his contribution of his farm to the Church should be set aside as the product of "undue influence." [15]

---

[7] Opp. at 7.

[8] *See* Petition at 4-7; *id.* at 9 (noting that McElroy's attorney had emphasized to the jury that McElroy had actually "bought [the Church's doctrine] lock, stock" and barrel); *id.* at 9-12 & nn. 33, 34.

[9] Opp. at 10.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Petition at 16 (footnotes omitted) (quoting App. 5a).

[14] Opp. at 12.

[15] *See* Petition at 15-24.

II.

McElroy Has Failed to Defend the Use of His Religious Beliefs and Actions by the Courts Below to Prove "Undue Influence" by Petitioners, *or* to Justify the Court of Appeals' Disregard of the Substantial Risk That the Jury's Verdict Rested on Grounds Forbidden by the Religion Clauses.

Having confirmed petitioners' contention that the judgment below treated McElroy's very acceptance, on faith, of the Church's teachings as proof of "indoctrination," and that, on this basis alone, the courts below permitted McElroy to rescind his long-completed religious donation without proof of force, fraud, or other abuse, McElroy nevertheless blithely asserts that "no doctrinal attack issued here,"[16] and that "[t]his case represents [nothing more than] a long and ugly effort by petitioners to introduce the First Amendment into a case where it has no place."[17] Yet McElroy:

(a) leaves entirely unanswered petitioner Church's claim that the Court of Appeals' judgment rests on criteria that defy the Religion Clauses and the Church's rights thereunder[18];

(b) fails to address petitioners' argument that the rulings below represent discriminatory intrusions by civil courts into religious matters and jeopardize the autonomy of churches *vis-à-vis* both the state and disgruntled members or contributors[19]; and

(c) ignores altogether petitioners' objection that the courts below up-ended long-settled constitutional doc-

---

[16] Opp. at 8. *But see* Petition at 4-7, 9-12 & nn. 33, 34.

[17] Opp. at 15.

[18] Petition at 15-19.

[19] *Id.* at 19-24.

trine by refusing even to entertain the Church's First Amendment challenge to the state's "undue influence" rule *as applied to it*, on the transparently untenable ground that the rule, if *facially* valid, could pose no further threat.[19]

Especially given McElroy's refusal, on the record in this case, to confront any of these claims in his Brief in Opposition, the case for review on certiorari seems persuasive indeed—lest suits for refund or rescission become routine vehicles for the judicial surveillance of religious truth.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the instant petition be granted.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Mass. 02138
(617) 495-4621

JAMES P. GERLACH
LAROWE & GERLACH
110 Main Street
Reedsburg, Wisconsin 53959
(608) 524-6444

THOMAS D. BELL
DOAR, DRILL & SKOW
103 North Knowles Avenue
New Richmond, Wisconsin 54017
(715) 246-2211

*Counsel for Petitioners**

September 25, 1981.

---

[19] *Id.* at 25-29.

* Petitioners acknowledge the assistance of David H. Remes (J.D. 1979) of Boston, Mass., in the preparation of this petition.